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SUBMISSIONS TO
THE ROYAL COMMISSION
ON FINANCIAL MANAGEMENT
AND ACCOUNTABILITY

J. L. Doherty



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Introduction

Following the establishment of the Royal Commission on Financial Management and Accountability in November 1976, the Privy Council Office agreed to submit to the Commission background papers which reviewed certain elements of the concept of accountability as it has evolved within the Canadian parliamentary system of responsible Cabinet government. The papers which resulted are reproduced in this volume.

The first submission explores the fundamental elements of responsibility and accountability in our constitutional system where the control and direction of departments are vested in ministers. The second reviews the varied relationships between non-departmental structures and ministers. The evolution of the personnel management system associated with deputy ministers is described in the third paper. The fourth was prepared in response to a request from the Commission for a description of the activities of the Privy Council Office.

Each of the four background papers contains a description of convention and practice at the time of its preparation. They are research papers prepared by officials for the use of the Commission. It was understood with the Commission that the Prime Minister's approval of the papers should be neither sought nor obtained. The papers have been collected in this volume for the purpose of seeking informed and critical views. The papers will subsequently be revised and given more general circulation.

Privy Council Office
March 1979

SUBMISSION 1

RESPONSIBILITY
IN THE CONSTITUTION

PART I: Departmental
Structures

August, 1977

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Foreword

Since the Second World War, the Government of Canada and its associated Crown enterprises have played an increasingly significant role in the lives of Canadians. The growing demands of the citizenry and the response by its government have had far-reaching effects on the way in which our society recognizes and responds to particular problems. The program innovations introduced by government during the 'forties and 'fifties significantly increased the scope of government, and as its scope has continued to expand so has its size. Government has taken on an activist function in the creation of policy, and has institutionalized elaborate policy-making structures to support the function. During the last twenty years a new style of public service has evolved both to staff the policy-making structures and to administer the complex programs that they produce. A distinct species of policy 'co-ordinators' and others concerned with interdepartmental relations has been developed. New structures have grown up to help to channel the flow of initiatives; and more change has occurred in the way the government orders its machinery for getting things done, and in the variety and pervasiveness of the programs it delivers, than in any comparable period in our administrative and social history.

Ten years ago a number of steps were taken in an attempt to modernize government so that it might cope with its rapidly changing and always more onerous burdens. Apart from major structural changes, such as the establishment of a separate minister in charge of the Treasury Board and the elaboration of the Treasury Board's central management role, a major effort was made to bring order to the *process* of government. Borrowing from

the disciplines of science and technology, government endeavoured to introduce procedures built upon *systems theory* for organizing the flow of business, measuring productivity, and determining the value of its activities. It was an article of faith, evangelized by some and subscribed to by many, that structure and process held the keys to the solution of complex problems.

A decade has elapsed during which this theory has been applied in such diverse areas as the budgetary process, the role and use of the cabinet, the elaboration of a professional planning establishment, and the development of institutionalized mechanisms for 'horizontal' co-ordination. Each has had a degree of success, but not all have fulfilled the expectations attendant at their creation, and some have induced unforeseen side-effects. On the whole, however, given the scope and size of governmental operations, orderly process has been beneficial in smoothing the passage of complex problems and proposals. But looking back it is apparent that *process* can also obscure the identification and resolution of problems, and that applied indiscriminately or mechanically it is inefficacious.

Important changes have also taken place in the basic institutions of parliamentary and cabinet government. The complexity and size of government, the development of modern communications, and the organized involvement of the community in political action have made it more difficult for Parliament to remain the central focus of national affairs. Ministers have found their burden increasingly heavy, the search for solutions more time-consuming, and the process of resolution more difficult to relate to political concerns. Similarly, not only has the composition of the public service changed, but, because of the complexity of the *process*, the public servant has found it increasingly difficult to relate his particular functions to those of the government as a whole.

It is now more than thirty years since the current role played by government began to take hold of the federal establishment. As we enter its fourth decade, it is apparent that the problems caused by size and complexity will not recede. It is also clear that although a more scientific method sometimes helps both in problem solving and in organization, system piled upon system tends to make complexity more complex. The *constitutional responsibility* that lies at the heart of parliamentary government is, however, elemental. If understood and applied sensibly, it should ensure not

only that our governmental institutions are representative but that they can cope adequately with the changing needs of society.

Canadians live in a political democracy. Government is representative in character. It is, therefore, human, and must respond to the differing views and needs of the electorate, organized and unorganized, in all parts of the country. System and logic cannot always provide the most appropriate response by government to those whom it serves, and we have learned that the complex } rationality of government differs significantly from the precise } rationality of systems analysis.

The most important aspect of our government is that it is representative. Indeed, parliamentary and cabinet government is a *system* of representative and therefore responsible government. Looking back over all that has happened to government and society since the war, and more particularly during the last twenty years, it is apparent that our efforts to make government better able to meet the needs of society have not always been made with a clear understanding of the principles for the responsible use of power that underpin all of our constitutional arrangements. We have elaborated programs to meet perceived needs and internal management systems to control the consequent increase in governmental activity. Unfortunately, the combined effect of all these changes has militated against the clear exercise of constitutional responsibility, and has to a degree diffused both the beneficial value of power and accountability for its use. It is ironic that in consequence the system is widely perceived to be unresponsive, and although power continues to be exercised responsibly, there is concern that it is held in check not by the principles of responsibility but by the complexity of bureaucratic process.

This paper has three objectives: first, it seeks to peel away the layers of complexity and expose the essentials of parliamentary government as a system for controlling the exercise of the power of the state; second, it describes the constitutional system within which ministerial government operates and in relation to which solutions to particular discontents should be sought; third, it explains the nature of the personal responsibility and accountability of ministers and senior public servants, and the importance of their accountability to the successful functioning of parliamentary government.

(1)

(2)

(3)

I

THE CONSTITUTIONAL RESPONSIBILITY OF MINISTERS

Introduction

Responsible government in Canada is based on the individual and collective responsibilities of ministers to Parliament. Ministers of the Crown, charged with the duties of office, are answerable to Parliament, and they may remain in office only so long as they retain the confidence (i.e. support of a majority) of the members of the House of Commons. In our system of parliamentary and cabinet government, ministers are constitutionally responsible for the provision and conduct of the government. This is to say that through the law and the convention of the constitution, power and hence responsibility are concentrated in the hands of ministers. Ministers exercise power constitutionally because the law requires it and Parliament and their colleagues in the ministry hold them responsible for their actions under the law. ✓

The *constitutional responsibility* of ministers does not limit the obligation of other office holders to obey the law; rather it assures that Parliament may focus responsibility for the conduct of government on those of its members who hold ministerial office and who in the ultimate must personally answer to Parliament and thence the electorate for their actions and the actions of their subordinates. The constitutional responsibility of ministers enables Parliament to satisfy itself that power is exercised responsibly throughout the system of government.

Ministerial Government

Our system of government, deriving from British and pre and post confederation practice, is ministerial in character. Ministers, in their capacity as advisers of the Crown, are individually and

collectively responsible for most activities of government.¹ Their individual responsibilities are mainly legal in character. Principally, they exercise powers bestowed upon them by the Crown in Parliament and hold office at the pleasure of the Crown. The exercise of these powers, for which ministers are constitutionally responsible to Parliament, provides the foundation of responsible government. The collective responsibility of ministers is, on the other hand, primarily conventional rather than legal, providing the stability and unity essential to the conduct of ministerial government.²

Individual ministerial responsibility, i.e. the personal responsibility of the minister, derives from a time in history when in practice and not just in theory the Crown rather than ministers provided the government, and ministers merely advised the sovereign and were legally responsible to the Crown for their actions. Today, this legal individual responsibility of ministers reflects the theory and law of the constitution and remains a practical force because of the conventional responsibility of ministers to the House of Commons and the statutory basis on which ministers are charged with the administration of the public service. The individual responsibility of ministers also provides the basis for accountability throughout the system.³

Collective ministerial responsibility, a complex arrangement involving the personal responsibility of each minister and of ministers as a group, is of recent vintage in our constitution, dating back not much more than 100 years. It evolved as a means of providing stable government within the framework of the existing structure of ministerial government after the Crown had ceased itself to be the motive force of government. Ministers replaced the sovereign as the decision-makers of government, and collective responsibility made effective the collective leadership of ministers. However, because collective responsibility is conventional and recent rather than legal and ancient, its significance in terms of accountability in the system is indirect, though nonetheless essential.⁴

¹ In law, the Crown in Canada is the Queen represented by the Governor General.

² For an excellent discussion of the distinction between the law and the convention of the constitution, and of the process whereby precedent evolves into practice and practice becomes convention, see Sir Ivor Jennings, *Cabinet Government* 2nd edn., (Cambridge, 1951), pp. 1-13.

³ For a discussion of the legal basis of ministerial responsibility, see A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 10th edn., (London, 1964), pp. 325-327.

⁴ As collective responsibility and the means of achieving it modify the individual responsibilities of ministers, so accountability for officials, which is centred on the individual legal responsibilities of ministers, is affected by the essential requirement for unity within the government that is the *raison d'être* of collective responsibility.

The nature and importance to the system of the constitutional responsibility of ministers are not well understood and the continuing effectiveness of ministerial responsibility is sometimes questioned. In fact, the operation of ministerial responsibility does not differ widely in current practice from that of 200 years ago when it first became clearly distinguishable in the constitution, which is to say that it has generally operated in and reflected a political context.⁵

Ministerial responsibility is a fundamental principle of the constitution. It requires that a minister be personally answerable to the House of Commons for the exercise of power. Because the House determines the circumstances in which it operates, the principle has the flexibility necessary to deal with an infinite variety of situations in the widest of circumstances.

The principle of ministerial responsibility provides the foundation of our constitutional system for the control of power. It vests ministers with constitutional responsibility to Parliament that is unique to them and distinguishes them from others who hold office under the Crown. The principle governs the responsible use of power, and does not rely for its effectiveness on the application of the ultimate sanction of loss of office. Instances in which ministers have been required to resign have been relatively few.⁶ The fact that a minister will probably not lose office as the result of the exposure of a particular instance of mismanagement, or even the misuse of authority by officials, does not detract from his constitutional responsibility or his obligation to ensure that such instances do not occur. Indeed, his responsibility is honed by the ever-present possibility that in particular circumstances the minister may be embarrassed, suffer loss of prestige weakening himself and the government, jeopardize his standing with his colleagues and hence his political future, or even be forced to submit to public enquiry possibly resulting in censure and loss of office as a result of the way in which his power has been used. These possibilities underpin the constitutional responsibility of ministers, which forms the basis for accountability throughout the system.

⁵ For example, the circumstances in which a minister may lose office or come close to doing so are a matter of political judgement and bear little relationship to whether a minister had prior personal knowledge of the events for which he is being held responsible.

⁶ For extensive discussion of this matter see A. H. Birch, *Representative and Responsible Government* (London, 1964), pp. 139-149; and S. E. Finer, 'The Individual Responsibilities of Ministers' *Public Administration* vol. xxxiv, 1956.

The Evolution of the Constitution

Canadians live in a political system that has evolved over centuries in response to the need to control power. Government is a means of organizing the control of power, and however complex society and its problems may be, the responsible exercise of power is in the long run fundamental to the solution of national problems and the stability and well-being of society.

The need to control the exercise of power by the state is basic. The means we have chosen are also basic: the vesting of constitutional responsibility in ministers. To know and understand our history is to articulate the *system* according to which we are governed, to realize that it is a *system*, and that to change it in some particular way requires that we understand how that particular relates to the generality of our practices, why it is there, what consequences will flow from change, and what other changes may be necessary to ensure the integrity of the system as a whole.

It is essential, therefore, that we know our history and understand the origins of our practices. They provide a framework within which solutions to current complexities should be sought, or, if inadequate, they provide a point of reference for workable and hence worthwhile reform of the system.

Conclusion

Personal accountability provides the foundation of our system of parliamentary and cabinet government. It derives from the individual responsibility of ministers, which is in essence personal as opposed to institutional. It is shared with no one. It is the minister, not his office, who is responsible, and it is this that vests in him his unique *constitutional responsibility* for the use of power.

The origins, evolution, and nature of each minister's constitutional responsibility, and the impact upon its exercise of the means whereby collective responsibility is derived from the individual responsibilities of ministers, summarize the essence of our system of government and provide the parameters within which accountability may be sought.

II

THE ORIGINS OF INDIVIDUAL RESPONSIBILITY

Power in the Constitution

Constitutionally, the power of the state flows from the Crown and generally speaking may only be exercised by or on the authority of the Crown. Parliamentary and cabinet government is a system that has evolved to ensure that power is exercised responsibly by the Crown and its advisers.

The powers of the Crown may be divided into two classes, those deriving from the Crown in Parliament and those deriving from the prerogative. The powers of the Crown exercised under statute law are authorized by the law-making authority, which is the Crown in Parliament. Those deriving from the prerogative find their origins in the ancient customary powers of the king, which have become part of the Common Law and (like statutory powers) are subject to the interpretation of the courts¹ They are, however, exercised without reference to Parliament.

In theory, under the feudal Crown all power flowed from the prerogative. The king exercised not only the executive power, but also what later became the legislative power (principally the authority to tax and to spend) and through his courts the judicial power.

The history of Parliamentary government has been a process of narrowing the exercise of the prerogative authority by subjecting it increasingly to the pre-eminence of the statutory authority, substituting the authority of the Crown in Parliament for the authority of the Crown alone. This process may aptly be characterized as having made the Crown responsible to Parliament for the exercise of its power. The Crown continues to exercise the legisla-

¹ See *Halsbury's Laws of England* 14th edn., (London, 1974), vol. viii, p. 583.

tive power, but it can only do so with the approval of Parliament. Coincidentally, although the Crown continues to preside over the courts, it has been required to exercise the judicial function through an independent judiciary. These are the qualities that make the Crown 'constitutional', and the means whereby this has occurred have gradually reduced the Crown's prerogative powers and ensured that the residue is subject to judicial interpretation. It is important to note, however, that throughout the process authority for the exercise of power has remained with the Crown, and the exercise of power by the Crown on the advice of responsible ministers forms the basis of constitutional responsibility for the exercise of power in the system as we know it today.²

The Responsible Use of Power

The medieval Crown was supposed to provide the customary costs of government from its hereditary and feudal revenues. There was no system of taxation, and thus no pecuniary need for the Crown to consult lords or commoners. Government was minimal in scope, but there was, nonetheless, a well-defined concept of responsibility according to which it was the duty of the Crown to provide the governance of the realm, and from the earliest days the chief men of the realm advised the Crown on its administration. The notion of the government being provided by the 'King in Council' is as old as the Norman conquest.

War could not, however, be financed from the hereditary revenues, and the expense of war gave rise to the imposition of extraordinary taxes over and above the traditional feudal levy. Taxation created tension between the Crown and the baronage, culminating in the first milestone of responsible government, *Magna Carta*, which established that the prior consent of those to be taxed was necessary before taxes could be levied by the Crown. By the 13th century the development of society was such that taxation began to be imposed directly on a class of landed gentry and burghers that was as articulate as the baronage, and the principle established by *Magna Carta* required that they consent to the levying of taxes. The development of an assembly of

² For discussion of this elusive subject see S. A. de Smith, *Constitutional and Administrative Law* 2nd edn., (London, 1973), pp. 114 ff; and Sir William Anson, *The Law and Custom of the Constitution* 4th edn., (Oxford, 1935), vol. ii, pt. i, pp. 17-72.

commoners for this purpose completed the essential structure of Parliament as we know it: the Crown, the Upper House and the Commons. ✓

It was not, however, until the constitutional struggle in the 17th century that the principal steps were taken that made possible the responsibility of the 'Government' to the House of Commons, which became clearly distinguishable (if not always upheld) in the constitution by the close of the 18th century. The struggle between the commoners and the Crown in the 17th century was qualitatively no different from that between the Crown and the baronage in the 13th century: each was pursued to force the Crown to exercise power responsibly.

The weakening of the baronage during the long period of civil strife preceding the establishment of the Tudors, was followed by a vigorous reassertion of the power of the Crown, which climaxed during the reign of Charles I. The responsibility that had been forced upon the Crown by the medieval baronage had receded as the power of the baronage declined, and in the 17th century was cast off in favour of the Stuarts' belief in 'Divine Right of Kings'. By the mid-17th century the principal restraint on the Crown and the principal source of revenue were the newly established mercantile and landed gentry classes, who were the commoners. The imposition on this group of taxation without consent, and the enforcement of its collection without recourse through law, precipitated the great struggle between the Crown and the Commons.³ That struggle witnessed the ultimate penalty for personal irresponsibility in the use of power: the execution of a king; and its outcome was to establish the foundation of the convention of ministerial responsibility before the House of Commons.

The Origins of Ministerial Responsibility

By the close of the 17th century, more particularly through the *Bill of Rights*, the *Mutiny Act*, and the *Act of Settlement*, the Crown's dependency on the Commons for the imposition of taxes was embedded in the constitution.⁴ The king's advisers continued

³ The best-known of these taxes was Shipmoney, a levy on each county for the provision of ships for the king's service, and the means of enforcement was the Star Chamber, which dispensed with the procedures of the courts in order to place criminal justice in the hands of the king.

⁴ These measures created 'constitutional monarchy'. The *Bill of Rights* (1689) established that the law making authority is the Crown in Parliament, the *Mutiny Act* (1689) made the existence of the army dependent on the annual approval of Parliament, and the *Act of Settlement* (1701) *inter alia* removed the control of justice from the hands of the king.

to be appointed by the Crown, but they found it necessary to work in harmony with the Commons because it exercised control over the financial and military power of the Crown. If the king's ministers, those in charge of the principal offices of state, were to function successfully, if money was to be granted, they had to get along with a majority of members of the Commons. Gradually ministers saw the importance of—and a considerable number, particularly those with financial responsibilities, profited from—being members of the House of Commons.

Control over ways and means (taxation) and supply (expenditure) enabled the House of Commons to hold ministers responsible for their actions, which is to say that ministers, appointed by the Crown, were held responsible for the actions they took in the name of the Crown. This individual responsibility was manifested not only in the accounting that ministers might be required to give to Parliament, but also in the impeachment procedures that were used to force the Crown to dismiss a minister who ceased to enjoy the confidence of Parliament.⁵ There was little respect for the concept of 'the Government', and ministers entered and left office individually as the king (occasionally at the behest of Parliament) saw fit.

The ability of the king to pick and choose ministers was circumscribed by political forces at work in Parliament and among ministers. The growth of political parties favouring particular groups of ministers further reduced the exercise of the Crown's prerogative. George I, the beneficiary of the Hanoverian Settlement, owed his throne to the new Whig party, and was constrained to select his ministers from this group.⁶ George I had the additional handicap of speaking little English. The powers of royal patronage were now increasingly exercised on the advice of the principal Treasury Lord, who became the first of the king's ministers. In

⁵ 'Parliament used to bring Ministers to account by a semi-judicial process. The King could do no wrong in the eyes of the law (unless he was Charles I or James II) and it was more satisfactory and expedient to attack his advisers for their evil counsel by charging them with high crimes and misdemeanours. The Commons were the accusers; the Lords were the judges; the process was called impeachment. Not only Ministers but officials and judges accused of corruption, were impeached; the verdicts were not necessarily a foregone conclusion. During the course of the 18th century votes of censure against Ministers and Governments gradually replaced the cumbersome machinery of impeachment; political accountability was better achieved without a heavy-handed political trial. The last impeachment was brought in 1805; the procedure has never been abolished but it is in practice obsolete.' It survives in the United States. See de Smith, *Constitutional and Administrative Law* p. 169.

⁶ The Crown devolved on the House of Hanover according to the terms of the *Act of Settlement* of 1701. When Queen Anne died in 1714, the Tories straddled the fence between George and the Stuart pretender (James II's son) whereas the Whigs firmly backed the settlement of the Crown on George, the Elector of Hanover.

short, the Hanoverian Settlement began the process of substituting prime ministerial control for the king's control over the selection of ministers.

By the time of the Seven Years War the First Lord of the Treasury had begun to be known as first or prime minister.⁷ By the end of the century the prime minister had taken effective control over the appointment although not necessarily the dismissal of ministers and some other senior office holders.⁸ This development made possible and was accompanied by the emergence of the cabinet as a device for co-ordinating the views of ministers in order to enable them to support one another in the House of Commons. In this way the critical convention of collective responsibility was added to the individual responsibility of ministers, which in the 18th century was a legal matter rendering them liable to impeachment. Individual responsibility remains the primary legal basis of the system today. The possibility of impeachment has been replaced by the threat of loss of office, which usually takes place through voluntary resignation in order not to invoke the collective responsibility of colleagues that would result in removal from office of the ministry as a whole.⁹

Ways and Means, and Supply

The imposition of constitutional responsibility, first on the Crown and later (in its behalf) on its advisers, came about through the struggle first of the Lords and later the Commons to force the Crown to levy taxes only by consent.

During the century that followed the model or first true Parliament of 1295, it was the practice for grants to the Crown to be made by the Commons with the advice and assent of the Lords. This practice, like most matters relating to Parliament, was of somewhat doubtful permanence given the neglect of that institution during the civil strife of the 15th century and its co-optation

⁷ It was first used as a term of derision by Walpole's political opponents during his long tenure as First Lord of the Treasury from 1721 to 1742.

⁸ The right of a prime minister to require the resignation of his colleagues has been exercised very sparingly. The precedent was established in 1792 when the younger Pitt secured the dismissal of the Lord Chancellor by informing the King that he must choose between the Lord Chancellor and himself. It was not until the late 19th century that the precedent became convention. Today the 'confederal' nature of the relationship among ministers and between ministers and the prime minister is confirmed by the sparing use of the prime minister's right to dismiss ministers and the unhappy consequences that usually follow from the removal of groups of ministers. See Robert, Lord Blake, *The Office of Prime Minister* (Oxford, 1975), pp. 30-39.

⁹ See Anson, *Law and Custom of the Constitution* vol. ii, pt. i, p. 118.

to the autocratic tastes of the early Tudors. The practice was, however, actively reasserted towards the close of the 16th century and under Charles I it precipitated the great constitutional crisis of the 17th century. The *Bill of Rights* and later the *Act of Settlement* resolved the responsibility of the Crown to act in accordance with the law, and in particular the *Bill of Rights* established that 'levying money for or to the use of the Crown . . . without grant of parliament . . . is illegal', and set in place annual meetings of Parliament that led to a system of annual grants of money to the Crown.¹⁰

Until the 18th century, the practice had been for Parliament to approve the levying of a specific tax so that the proceeds could be used for a particular purpose. Control of the purse (i.e. the permission to spend, or granting supply) was a consequence rather than the cause of Parliamentary control of taxation. In essence, therefore, Parliamentary control over public spending grew out of the struggle to prevent the arbitrary imposition of taxation. These circumstances, coupled with the constitutional principle that because power emanates from the Crown only the Crown may govern, established that only the Crown could propose a tax or an expenditure. Erskine May, the foremost authority on the subject, has put it like this:

The Sovereign, being the executive power, is charged with the management of all the revenue of the State, and with all payments for the public service. The Crown, therefore, acting with the advice of its responsible ministers, makes known to the Commons the pecuniary necessities of the government; the Commons, in return, grant such aids or supplies as are required to satisfy these demands; and they provide by taxes, and by the appropriation of other sources of the public income, the ways and means to meet the supplies which they have granted. Thus the Crown demands money, the Commons grant it, and the Lords assent to the grant: but the Commons do not vote money unless it be required by the Crown; nor do they impose or augment taxes, unless such taxation be necessary for the public service, as declared by the Crown through its constitutional advisers.¹¹

The latter principle was placed among the rules of the Commons at the beginning of the 18th century.

¹⁰ See Jennings, *Parliament* p. 283.

¹¹ Sir Erskine May, *The Law, Privileges, Proceedings and Usage of Parliament* 18th edn., ed. by Sir Barnett Cocks, (London, 1971), p. 676. (May first published his book in 1844, and he and later his successors have kept it up to date.) It should also be noted that any M.P. may propose a *reduction* in expenditure.

Following the constitutional watershed of the 17th century, the constitutional advisers of the Crown became more closely associated with Parliament until by the mid-18th century they became inseparable from it. At a time when government was growing, political parties taking more permanent form, and the Crown was if not always less politically active certainly more inured to the acceptance of 'advice', the ministry as we now know it began to emerge in the constitution.

Following the passage of the *Mutiny Act* in 1689 all military expenditure was made subject to annual votes of supply. The civil government was in theory provided from the proceeds of the *Civil List*, voted to the Crown at the beginning of each reign and renewed without further reference to Parliament each year until the sovereign's demise. In fact, however, there were frequent deficits and corresponding need for the king's ministers to seek new supply from the Commons.¹² Indeed, Parliament annually appropriated the bulk of public expenditure throughout the 18th century, although it must be admitted that the scrutiny of the Commons was cursory and there was a general expectation that it was up to the Treasury to assure the Commons that spending was being adequately managed and controlled.¹³ The principle of annual appropriations by Parliament was extended to all civil expenditure in the first part of the 19th century when by stages the *Civil List* was reduced to meet only the personal expenses of the sovereign, and funding for the civil administration was placed on the same annual basis as that for the military services. ✓

Conclusion

The constitutional history of parliamentary and cabinet government traces the process of ensuring that individuals who exercise power are constitutionally responsible. At first the Crown, the source of power in the system, was held responsible by the great men who were the principal officers of the realm. Later it was the

¹² It is worth noting that the charge of the civil administration on the public purse in the 18th century was at best one-tenth (and often less) of the charge of the naval and military services.

¹³ For an excellent account of the Commons' relationship with the Treasury during the 18th and 19th centuries see Henry Roseveare, *the Treasury* (London, 1969), pp. 88-132. At p. 91, Roseveare cites the apparently typical views of one M.P. on the subject of accountability in 1775: 'Could any ministers carry on the business of the public if any gentleman in this House has a right to call for such an account? It would be impossible . . . ; the public service can never be advanced by calling for accounts which destroy your confidence in them.' The author of this statement merely recorded that in *partisan* circumstances questions of administration are unlikely to be discussed dispassionately.

Commons that sought this role, and ultimately secured it through holding the Crown accountable by making its advisers responsible to the House for their exercise of the Crown's power. Thus the individual power of the king was made responsible by *Magna Carta* in the 13th century and by the *Bill of Rights* in the 17th century. In the 18th century that power was placed in commission,¹⁴ and the ministers who exercised it were made responsible individually to the House of Commons. Our system of parliamentary and cabinet government is, therefore, based on the constitutional responsibility of ministers to the elected House of Commons, monarchical government having been succeeded in the *efficient* constitution by ministerial government.¹⁵

¹⁴ See below p. 1-13 for a discussion of this term.

¹⁵ Bagehot distinguished between two classes of institutions within the constitution: '... first, those which excite and preserve the reverence of the population—the *dignified* parts, if I may so call them; and next, the *efficient* parts—those by which it, in fact, works and rules. . . . The dignified parts of government are those which bring it force—which attract its motive power. The efficient parts only employ that power'. Walter Bagehot, *The English Constitution* 2nd edn. (London, 1896), pp. 4-5. It might be added that the dignified parts are essential to the operation of the law of the constitution, whereas the efficient parts reflect practice and custom in the application of law and convention.

III

THE ORIGINS OF COLLECTIVE RESPONSIBILITY

Introduction

The supply procedure evolved in concert with the gradual supersession of monarchical by ministerial government in the efficient constitution. Although control of supply by the Commons is fundamental to the responsible exercise of power by ministers, and forms the conventional basis for individual ministerial responsibility, its evolution was greatly influenced by the convention of collective responsibility and the means for sustaining the cohesion of the ministry.

Treasury Control

The principle that only the Crown could ask the Commons to impose taxation and authorize expenditure for the civil, naval, and military services not only protected the taxpayer from the generosity of the House of Commons, it also had the effect of reinforcing the position of the Treasury Lords within the ranks of the king's ministers. As public expenditure grew, it became more and more important to ensure that it could be defended in the Commons. Early in the 18th century this need was recognized and the office of Lord Treasurer was placed in commission partly in order to ensure the presence in the Commons of several ministers competent to defend the Estimates.¹ The new Treasury Lords

¹ During the constitutional seesaw between Crown and Commons in the 17th and 18th centuries, it became the practice to place 'in commission' important offices, whose holders might become too powerful or too susceptible to the influence of the Crown or the Commons. Thus the office of Lord High Treasurer was placed in commission from time to time during the 17th century and permanently after 1714. The commission consisted of a group of individuals known as the Lords Commissioners of the Treasury, who collectively fulfilled the functions of Lord High Treasurer. Similarly, in 1708 the office of Lord High Admiral was placed in commission, its functions being discharged by the Admiralty Board.

defended government expenditure, and sitting as a Treasury Board required their colleagues in the ministry to justify proposed expenditures for which the Commons would be asked to vote supply. The function of the Treasury in *reconciling the demands of ministers for funds* into a single request for supply was fundamental to safeguarding the Crown's constitutional prerogative that only it could ask the House to grant supply. The 'painful pre-eminence' of the Treasury was a matter of concern to other ministers, but the Treasury Lords took seriously their responsibility to control public expenditure, as was expected of them by the Commons.²

The function of reconciling estimates was and remains a crucial element in establishing and maintaining the solidarity of the ministry and of ensuring that it retains the confidence of the House of Commons. The function is fundamental to the responsibility of the ministry to Parliament. In addition, because finance impinges so directly upon administration, the reconciliation of estimates provides the basis for the management of the public service in accordance with particular standards and procedures, whose observance is in turn central to the cohesion of the ministry and for which ministers and their officials must be held accountable if the system is to be responsible.

Prime Minister and Cabinet

In 1721, ten years after the Treasury was placed in commission and the First Lord assumed the Crown's prerogative of appointment over his Treasury colleagues,³ Robert Walpole received the Exchequer seals and gradually took on the role of the king's first minister. The growth of the party system, and the gradual elimination of the Crown as the central political influence,

² Roseveare, *The Treasury* p. 129. Operating under the close direction of the First Lord, who if a commoner strengthened his control by holding office also as Chancellor of the Exchequer, the Treasury Board continued to work in this manner until the middle of the 19th century when its functions were taken over by its staff under the direction of the Chancellor of the Exchequer separate from the prime minister. The demise of the Treasury Board was the direct consequence of two developments: first, the development of a modern civil service; and, second, although the position of First Lord had been built into the post of prime minister on the basis of Treasury control and Treasury patronage, by the 1850's the prime minister was well enough established that it was no longer necessary for him personally to supervise the exercise of these powers.

³ This was a significant development for in later years it opened the way for the prime minister to recommend the appointment of all of his colleagues in the ministry. See Anson, *Law and Custom of the Constitution* vol. ii, pt. i, p. 190.

made possible the evolution of Walpole as the first prime minister known to the convention of the constitution. As First Lord of the Treasury and Chancellor of the Exchequer, Walpole had extensive financial sway over his colleagues and a 'large patronage', which he put to use to build support for his position and to ensure loyalty in the swelling ranks of office holders.⁴ At the end of the 18th century looking back on his time in government and more especially opposition, even Fox remarked that 'It was impossible for the government of a great kingdom to go on, unless it had certain lucrative and honourable situations to bestow on its officers.'⁵ And in 1850 Peel, the first prime minister to function in constitutional circumstances more or less similar to our own, remarked simply that 'the Prime Minister has the patronage of the Crown to exercise'.⁶ In short, given the political circumstances of the day, Treasury control and Treasury patronage made possible the development of the position of prime minister (and of political parties).

In the same period the institution known as the cabinet replaced the king's council as the principal deliberative forum of government.⁷ The concept took root of a ministry consisting only of the heads of the great departments of state and other holders of ministerial office. Gradually, as the prime minister's powers of appointment over his colleagues increased, it became the practice for the ministry to meet in the cabinet at 10, Downing Street under the chairmanship of the prime minister.⁸

In effect, the motive power of the constitution was passing from the Crown to its advisers. The Crown was becoming associated more with the dignified than with the efficient parts of the

⁴ Anson, *Law and Custom of the Constitution* vol. ii, pt. i, p. 191. Indeed, Walpole's use of royal patronage to influence elections led to renewed efforts to exclude office holders (other than ministers) from membership in the House of Commons. For discussion of the efforts to forbid office holders or 'placemen' from membership of the Commons, see Alpheus Todd, *Parliamentary Government in England* (London, 1892), vol. i, pp. 242-248.

⁵ See Parris, *Constitutional Bureaucracy* p. 29. Charles James Fox was the parliamentary opponent of the younger Pitt.

⁶ See Jennings, *Cabinet Government* p. 140.

⁷ The king's council was composed of a privileged group of members of the Privy Council known as cabinet councillors. The group usually included former holders of ministerial office, whom in theory the king wished to continue to consult, as well as the members of the cabinet. Its complete supersession by the cabinet towards the end of the 18th century coincided with the decline of the king's participation in political activity.

⁸ Modern usage, which traces its origins to the 18th century, distinguishes between the ministry and the cabinet. The ministry is a *term* applied to ministers holding office at the pleasure of the Crown, and individually responsible in law to the Crown and by convention to the House of Commons for their activities. The cabinet is a *place* provided by the prime minister to enable his colleagues informally to develop the collective responsibility of the ministry required by the convention of the constitution. In a word, the cabinet is the prime minister's cabinet and is the physical expression of collective responsibility. The ministry, on the other hand, summarizes the individual authority of its members.

constitution. The prime minister sought to concert the policies of his colleagues and ensure their solidarity before Parliament. The latter was often breached in the 18th century. Indeed, it was not until after the *Reform Act* of 1832 that extended the franchise and crystalized the party system, and the complete withdrawal of the Crown from politics following the Prince Consort's death in 1861, that collective responsibility was firmly established in the convention of the constitution.⁹ Nonetheless, its origins in the 18th century are unmistakable, and its lengthy gestation paralleled the maturing of the role of prime minister as the principal architect of unity within the ministry. By the close of the 18th century, the cabinet was composed solely of those charged with the administration of the departments of the government (besides of few senior colleagues holding sinecure offices), and since the passage of the *Reform Act* in 1832 the ministry has regarded the loss of a major initiative by any of its members in the House as vote of want of confidence and cause for the ministry as a whole to resign.¹⁰

Conclusion

3
✓ Collective responsibility is the cement of our system of government. Its three key elements are Treasury control and the allied convention that the government alone and as a single entity may
✓ ask the Commons to approve ways and means and vote supply, and the de facto powers of appointment over ministers and other
✓ holders of high office that are exercised by a prime minister that emanate from his historic role as the arbiter of Treasury control and patronage. These are the elements that make possible the cabinet, which exists to bring together the individual responsibilities of ministers so that they may be exercised by each minister in a manner that is acceptable to all ministers. It is evident that although collective responsibility unlike individual responsibility is conventional rather than legal, it is fashioned through means that may serve to make more effective the exercise of individual responsibility and which must influence accountability within the system.

⁹ See A.J.P. Taylor, 'Queen Victoria and the Constitution' *Essays in English History* (London, 1976), pp. 65-66.

¹⁰ The first instance of a 'clean sweep' of the ministry occurred in 1782 when Lord North resigned and all but one of his colleagues (the Lord Chancellor) went with him. Blake, *The Office of Prime Minister* p. 5.

IV

CANADIAN ADAPTATION AND PRACTICE

The Fabric of the Constitution

The *British North America Act*, enacted at Westminster in 1867, is Canada's basic constitutional document. The Act created Canada's Parliament and provided for an executive government in the Governor General exercising the powers of the Crown on the advice of the Privy Council. Although the Act says little else about the executive, it implies the then well established conventions of the British constitution requiring the Crown to act on "advice".

The Act presupposes, and its preamble makes clear, that as a constitutional document it must be taken in conjunction with the body of precedent and Common Law from which it itself emerged.¹ Accordingly, the *BNA Act* does not specify the responsibility of the ministry to Parliament, the office of prime minister or the powers of that office. The Act did, however, define the composition of Parliament, and in that it assumed that in the exercise of executive authority the Crown would be responsible to and dependent upon the approval of the Senate and the House of Commons. Indeed, not only did convention demand that the ministers answer to the House of Commons for the advice given the Crown, but the responsibility of the ministry before Parliament may be said to have been implicit in the Act. In these respects the *BNA Act* reflected most of the more important conventions sur-

¹ The preamble reads in part: "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom . . . And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also the Nature of the Executive Government therein be declared . . ." *The British North America Act* 1867 30° and 31° Victoriae, cap. 3, 29 March 1867.

rounding the individual responsibilities of ministers for their actions.²

The Act acknowledged in law the control of the House of Commons over taxing and spending. It also established in law that spending proposals could only be made by the Crown.³ These essential aspects of the supply procedure indirectly introduced into the law an element of collective ministerial responsibility, which by the mid-19th century had begun to take a firm hold in the constitution through the convention that spending proposals must come from the government as a whole, and through the special unifying role that was the *raison d'être* for the prime minister and the emergence of the cabinet. Each of these conventional rules was to have an important influence on the development of responsibility in the constitution.

Although the Canadian constitution was provided for in the *BNA Act* and the constitutional practice and custom of Westminster's traditions and the body of English Common Law, Canada already had a body of constitutional experience upon which to draw, dating from the colonial period. The development of local self-government in Britain's settled colonial possessions during the middle part of the 19th century following the dismantling of the old and unrepresentative colonial system was marked by the establishment of miniature replicas of the Queen's government, which in the principal provinces of British North America, the Australian states, and New Zealand was reproduced in the form of a governor, executive council, and legislature.

Eventually these arrangements came fully to respect their origins in England's constitutional history, their underlying purpose being to carry forward the principle of constitutional responsibility for the exercise of power. More particularly, and after some struggle, the principle of ministerial responsibility became the centrepiece of these colonial arrangements, the members of the executive council being individually responsible to the legislature with the governor acting on "advice".

A colony was, nevertheless, not an independent state. The governor, although the representative of the constitutional Crown, was answerable to the Crown's advisers in Whitehall. In matters

² The *South Africa Act* of 1909 was more specific about the organization of the government taking the summary of constitutional developments further than the *BNA Act*. Section 14, in particular, refers to departments of government being headed by ministers, who shall be members of the Executive council.

³ This provision had also appeared in the *Act of Union* of 1840 that created the Province of Canada.

other than local government, or when doubts arose about the powers of a colonial administration to take specific actions, the governor might be required to act on the instructions of the Colonial Secretary at Whitehall rather than on the advice of his executive council. Direct intervention by Whitehall would, however, have been “at variance with the acknowledged principles of ministerial responsibility within the colony in all matters of local concern”.⁴ Although constitutional responsibility was achieved only after some struggle with colonial governors and Whitehall, once established respect for the principle had particular consequences for the role of colonial legislatures and later for the parliaments that were established when the former colonies achieved independence through dominion status.

The potential conflict between the governor’s instructions from Whitehall and the advice of his executive council (and the consequent threat to the responsible exercise of power in the colony) was largely avoided by requiring executive councils to exercise the authority of the Crown through the legislature rather than by virtue of the prerogative, and through the related practice of disallowing colonial legislation. Ministerial responsibility *vis-à-vis* the legislature was in no way trammelled if a proposal of a minister was approved by the legislature, and the action of the legislature subsequently disallowed by the governor on instructions from Whitehall. As Alpheus Todd has noted:

The supremacy of the Crown over colonies which possess representative institutions, and have been further intrusted with privileges of local self-government by the incorporation into their political system of the principal of responsible government, is ordinarily exercised only in the appointment and control of the governor as an Imperial officer, and in the allowance or disallowance in certain cases of the enactments of the local legislature.⁵

This procedure for ensuring the constitutional responsibility of colonial ministers to colonial legislatures gave the latter a greater role in administrative and other matters than was enjoyed by Parliament at Westminster, where such arrangements were usual-

⁴ Alpheus Todd, *Parliamentary Government in the British Colonies* 2nd edn., (London: Longmans, Green, 1894), p. 200. In British North America, more precisely in the provinces of Canada and Nova Scotia, ministerial responsibility was established in the 1840’s during the decade following the Durham Report.

⁵ Todd, *Parliamentary Government in the British Colonies* pp. 107-108.

ly carried out on the authority of the royal prerogative without reference to Parliament.

The pattern established in the colonial period was followed after Canada achieved dominion status, and although disallowance by Whitehall of the Canadian Parliament's legislative proposals was for most practical purposes a dead letter after 1867, the tradition was preserved of calling upon Parliament to act in a wide variety of administrative matters including the organizational framework of the public service and the standards by which it is managed.

The Structure of Government

Canada's colonial heritage provided from the outset that the dominion government would seek to use the law-making rather than prerogative authority for major new organizational forms and important administrative matters. In accordance with the practices described earlier, the provinces of British North America had sought legislative bases for their major administrative units, and these (particularly those of the Province of Canada) were carried forward, elaborated, and added to by the new federal Parliament.⁶

Parliament has provided a legislative base for each department of government, and it authorizes the payment of salaries to ministers. Each minister is individually responsible for his department. The system is built on this individual responsibility and revolves around twenty odd program departments whose ministers are responsible for the greater part of governmental spending. These are the ministers whose activities in Parliament and the public service provide the essential basis of ministerial government and from whom accountability for the exercise of power through the expenditure of public monies is sought by Parliament.⁷

⁶ For another aspect of the influence of our colonial experience on the development of the post-confederation public service, see J.E. Hodgetts, *The Canadian Public Service* (Toronto, 1973), pp. 55-58. It should also be noted that in 1867 the dominion government took over intact the institutions of the former Province of Canada, the *BNA Act* having made separate provision for the reestablishment of the former provinces of Upper and Lower Canada in the sections of the act dealing with Ontario and Quebec.

⁷ It was noted above (p. 1-2) that collective as opposed to individual responsibility is primarily conventional rather than legal in character. Legal collective responsibility is in fact reflected extensively in the law of the constitution. Action in the system is taken either by ministers individually or by the Crown on the collective advice of ministers. In each case the authority for action may reside either in powers bestowed by the Crown in Parliament or in the prerogative. Ministers have always been

The relationship between ministers is confederal in character. Each represents particular interests—departmental, regional, constituency, political, and so on. In the dignified constitution ministers are sworn to the Privy Council to advise the Governor General in the fulfilment of the Crown's duty to exercise the executive power.⁸ In the efficient constitution ministers are appointed to office by the prime minister and they exercise their individual functions in concert with the functions of their colleagues, and do so through the instrument of the prime minister's cabinet. The confederacy of independent ministers is made workable through the convention of collective responsibility. The convention is reflected in the activities of each minister, and ministers who preside over the spending departments are assisted by colleagues, whose functions are principally co-ordinating in character. As might be expected, given the origins of collective responsibility in the system, principal among these co-ordinators are ministers who exercise special powers over matters of finance and, in the case of the prime minister, appointment to high office.⁹

The system faithfully reflects the evolution of constitutional responsibility stretching back to *Magna Carta* and beyond. Ministers, individually responsible for their expenditure of taxes are co-ordinated in these activities by colleagues whose function is to

individually responsible for their departments, but until the end of the second world war it was common practice to require ministers to take specific actions only with the approval of the Governor in Council. The reasons for this were political and to some extent reflected successive prime ministers' apprehension about the ability of colleagues to exercise powers prudently. In a limited way the requirement had the effect of introducing into the law of the constitution the conventional political function of the cabinet in seeking to maintain collective responsibility. The effect was limited, however, because the formal collective decisions required were largely administrative in nature having to do with contracts, appointments, and other matters of similar interest. As Professor Mallory has noted, the need for such formal vetting of administrative decisions declined as patronage became a less prominent feature of government; see *The Structure of Canadian Government* (Toronto, 1971), p. 104. Today, legal responsibility devolving on ministers collectively through the Governor in Council is reserved for important matters in which the government wishes to demonstrate formally action or advice that has been sanctioned by all ministers. Apart from the public nature of an order or minute of the Council, this device enables the government to provide legal evidence that action has been taken by the government, which contrasts with the more usual situation in which a minister acts on his individual authority having where appropriate informally secured the approval of his colleagues in the cabinet. In such cases the action is the minister's, cabinet having played its political function of ensuring that the minister will be supported by his colleagues. Action by the Governor in Council is formal action taken by the government and can be proven legally by production of an Order in Council to a court of law. Action by a minister may be equally formal and can be proven in law, but the fact of cabinet approval does not indicate any formal sharing of the minister's personal responsibility. Nor because of cabinet confidence would it be desirable for evidence of cabinet decision to be used to indicate that the minister's action was in fact the action of the government.

⁸ This provides one of the legal bases of the responsibility of ministers. The statutes that Parliament has enacted providing for their offices form the second legal basis for their responsibility. See above p. 1-2, footnote 3.

⁹ Co-ordinating ministers are also to be found in areas such as external and urban affairs, common services, and science and technology.

ensure the maintenance of solidarity within the ministry through the cultivation of collective responsibility among their colleagues.

Each minister's actions reflect the individual and collective responsibilities of the system that has been built up to ensure that they and their subordinates in the public service exercise power in a manner acceptable to a majority of the elected house of Parliament. Ministers are held accountable for the exercise of power by their colleagues internally and publicly each day in the House of Commons.¹⁰ The accountability of the minister to Parliament is the cornerstone of our constitutional system and the essence of the historical precedents that require the individual personally to answer to the House of Commons for his use of power. The collective responsibility of ministers is also tested each day in the House, and this conventional need for unity imposes an additional discipline on ministers, requiring them to account internally to each other for the exercise of their individual authority.

Throughout the system of government individual responsibility is sharpened by the requirements of collective responsibility. Each level of the bureaucracy reflects the confederal nature of the system, which builds up through the bureaucratic hierarchy to the level of ministers. It is a process that seeks constantly to resolve conflicting interests arising from the independent powers that flow from each minister's individual authority.

In theory, ministers are independent members of the confederal system that they themselves constitute. In practice, their independence is constrained by the need to find accommodations with their colleagues. The system is, therefore, based on a collective leadership, whose constituent elements seek constantly to establish and maintain a state of equilibrium. Ministers are supported throughout by a public service, which must also seek constantly for a balance between the interests and powers of the confederacy that it serves. The resolution of conflict is a constant and necessary concern of ministers, and is fundamental to ensuring that ministers exercise the power of the state responsibly. Extreme views, or initiatives that ignore the responsibilities of others in the system, threaten its essential equilibrium.

¹⁰ A recent prime minister of England has described the trepidation with which ministers prepare for question period, which he refers to as the 'high tribunal of the nation'. Unlike the practice at Westminster, in Canada ministers do not receive notice of questions and must answer in the House every day rather than from time to time. See Sir Harold Wilson, *The Governance of Britain* (London, 1976), p. 133ff.

Conclusion

Our system of government is not compartmentalized as between the government and Parliament. The executive is composed of Members of Parliament and is therefore not separate from Parliament. In order to provide sound government, ministers will endeavour to accommodate views based on differing responsibilities and interests, and to a large extent Parliament relies on the collective responsibility of the ministry to ensure that the responsibility of each minister is being exercised fairly and effectively. Indeed, the tension inherent in the search for equilibrium among differing functions and interests within the confederacy of ministers is essential to collective government by ministers, and without it Parliament would not have confidence in the government. As was noted earlier, Parliament historically has relied in part on the ministry itself to ensure responsible government. It expects ministers to answer for the way they discharge their duties, but Parliament does not itself seek to order the day to day affairs of government. This reliance on internal self-discipline is made possible by collective responsibility, and as the tasks of government grow more complex, the inter-reliance of ministers increases, providing additional checks on the exercise of the power vested in each.

V

THE FORGING OF CONSENSUS

Introduction

The confederal nature of the system requires that the resolution of conflict take place throughout the system at all its levels. As noted earlier, this process is assisted by ministers with special financial and policy co-ordinating functions, and they in turn are supported by bodies of officials organized in what are known as the central agencies.¹ In addition, specialized policy areas and the provision of services common to the needs of ministers collectively are organized under the direction of special ministers who are also supported by bodies of officials.² The officials of these departments and agencies play an important role in assisting other departments to co-ordinate the initiatives that flow from the program (i.e. spending) functions of their ministers. The central agencies, in particular, play a key role in a network of interdepartmental committees that endeavours to co-ordinate the differing functions of ministers involved in particular complex initiatives.

The Cabinet and its Secretariat

The cabinet is the essential forum for the creation of consensus among ministers. It is uniquely the prime minister's; he provides it to his colleagues as a forum within which he may lead them to agreement on particular matters that each will be pre-

¹ Principally the Cabinet Secretariat in the Privy Council Office, the Treasury Board's Secretariat, the Federal Provincial Relations Office, and the departments of Finance and External Affairs. The Public Service Commission is an independent body, and although not strictly a part of the government's machinery it plays an important role in providing skilled resources and training essential to the fulfilment of the government's programs.

² The Ministries of State and departments such as Supply and Services and Public Works.

pared publicly to defend.³ The cabinet is the mainspring of modern ministerial government. It is essentially a *political* mechanism, and as such it remains an informal body even though its 'decisions' are authoritative. Generally speaking, these 'decisions' complete the process of consensus-making whereby (in the formula of its recorded decisions) 'the cabinet agrees' with the proposal of a particular minister or ministers to exercise his or their individual responsibilities in some particular way. Ministers do not ask the cabinet to agree to each initiative they take deriving from their individual responsibilities, but only those that have political importance: i.e. those items likely to involve the collective responsibility of the ministry, requiring all ministers to stand behind the initiative of one or some of its members. The cabinet's historic role has been and is principally political in the sense described. In relatively recent times, however, the cabinet has also assumed a central role in the co-ordination of initiatives that require the *administrative* action of two or more departments. It is a matter of observation that these *political* and *administrative* co-ordinating roles of the cabinet have become enmeshed during the last two decades as a consequence of the growing complexity of the cabinet's business and the elaboration of the support services provided by its secretariat.⁴

The cabinet is served by its secretariat located in the Privy Council Office, which is responsible to the prime minister.⁵ At the direction of the prime minister, the Privy Council Office provides the cabinet's secretariat, and on behalf of the prime minister it organizes the cabinet's committee system and support services.⁶

³ See above, p. 1-15 footnote 8. Sir Robert Borden said of the misnamed Imperial War Cabinet that it was a 'Cabinet without collective responsibility and therefore without a Prime Minister'. See Anson, *Law and Custom of the Constitution* vol. ii, pt. 1, p. 150.

⁴ See below pp. 1-41 to 1-43.

⁵ Order in Council, P.C. 1962-240, 22 February 1962.

⁶ The secretariat was formed in 1940 when Arnold Heeney succeeded to the post of Clerk of the Privy Council and was (by the same instrument—P.C. 1121, 25 March 1940) appointed Secretary to the Cabinet. Prior to 1940 the Privy Council Office had been concerned solely with the formal work of the Council—the preparation of draft submissions for orders and minutes. The modern Privy Council Office is the responsibility of the prime minister. Until 1957 the prime minister always held a ministerial portfolio. In the early days it had been Justice and occasionally other offices (from 1912 to 1946 the prime minister was *ex officio* Secretary of State of External Affairs), but later the prime minister satisfied the conventional need (see below*) to hold formal office by assuming the Presidency of the Council. It happened that in 1940, Mr. King was both prime minister and President of the Privy Council, and the Clerk of the Council was responsible to him. Since the cabinet is the prime minister's cabinet, it was natural that the prime minister be responsible for the organization of its secretariat and this was accomplished through the device of Arnold Heeney's double-barrelled appointment. Since then the positions of Clerk and Secretary have been combined. When Mr. Pearson decided (as for brief periods before him had Messrs. St. Laurent and Diefenbaker) to use the Presidency of the Council to

The essential function of the cabinet's secretariat and other officials in the Privy Council Office, all of whom answer to the prime minister, is to assist the prime minister in establishing the equilibrium essential to the system. The Secretary to the Cabinet and his officers co-ordinate the initiatives of ministers' departments, ensuring informally as well as through an extensive system of interdepartmental committees that interdepartmental consultation takes place, to the extent possible disputes are resolved, and that remaining issues are clearly identified for discussion among ministers.

The Privy Council Office also supports the prime minister in the exercise of the other means that he uses to provide leadership and promote consensus in the system, including efforts to develop in consultation with his colleagues the general thrust of the government's program, the appointment of deputy ministers and other senior officials, and the general organization of the machinery of the government and relationships among its key elements, including the arbitration of jurisdictional disputes between ministers.

In all of this the Privy Council Office seeks to facilitate and assist rather than to create and direct. The office must respect the confederal nature of the system in which power flows from ministers. Its roles are to co-ordinate the exercise of power and to assist the prime minister in leading his colleagues to establish the general orientation of the government. These are powerful roles. But the office, like its master, exists primarily to promote consensus by maintaining the equilibrium among ministers, and this *raison d'être* remains valid so long as neither the secretariat nor departments lose sight of the essential differences in their respective roles, the one co-ordinating and the others initiating.

attract senior colleagues without burdening them with departmental duties, and later Mr. Trudeau decided to devolve the leadership of the House on a separate minister, the prime minister gave up the Presidency of the Council but he kept the Privy Council Office. The office is not, therefore, a responsibility of the President of the Privy Council and has no formal relationship with him.

*The *Salaries Act* provides a separate salary for the 'Member of the Queen's Privy Council holding the recognized position of First Minister'. The original intent of this provision was to provide a higher salary for the prime minister than he would otherwise receive as the minister holding one of the other portfolios set out in the *Salaries Act*, such as Justice or the Presidency of the Council.

The original *Salaries Act* of 1868 made no provision for the prime minister, and it was only in 1873 that provision was made to enable the 'First Minister' to receive 'in addition' to his regular ministerial salary the sum of \$1,000. But an amendment passed in 1920 provided a completely separate salary for the 'First Minister'. This provision established in law the distinct nature of the prime minister's office. Nonetheless, for many years it had the effect of merely ensuring that the prime minister would be remunerated as 'First Minister' rather than according to whatever ministerial portfolio he happened to hold. It was not, however, until Mr. Diefenbaker's administration that full advantage was taken of the statutory base provided in 1920 and the prime minister served without holding a separate ministerial portfolio.

The Treasury Board and its Secretariat

The Treasury Board, a committee of the cabinet, is a second essential mechanism devoted to assisting ministers in the exercise of their collective responsibilities.⁷ For the historical reasons set out earlier, finance was an essential part of the establishment of the office of prime minister, and the President of the Treasury Board and his colleagues exercise on the prime minister's behalf the latter's unifying functions of financial control.

Put simply, the Treasury Board is a mechanism that the ministry has imposed on itself for the preparation and reconciliation of estimates. It was established on the prime minister's recommendation at confederation and provided with a statutory base two years later.⁸ Until the *Financial Administration Act* was set in place in 1951, the Treasury Board conducted all of its business subject to the formal approval of the Governor in Council, and the cabinet continues to insist on its right to approve the estimates framed by the Treasury Board within the parameters set by the cabinet and to hear appeals by ministers against particular decisions of the Treasury Board.⁹

⁷ The Treasury Board is formally a committee of the Privy Council. As such it disposes of a wide variety of business deriving from its statutory responsibilities. It operates, however, as a committee of the cabinet, and it is the cabinet that has the last word. See below, p. 1-28, footnote 9.

⁸ See *An Act Respecting the Department of Finance* 32°-33°Victoriae, Cap. iv. The Act stated that the Board 'shall act as a committee of the Queen's Privy Council for Canada, on all matters relating to Finance, Revenue and Expenditure, or Public Accounts, which may be referred to it by the Council, and shall have power to require from any public department, board or officer, or other person or party bound by law to furnish the same to the Government, any account, return, statement, document, or information which the Board may deem requisite for the due performance of its duties'.

⁹ The Governor in Council is a formal mechanism for authorizing action by the Crown as distinct from action by ministers on behalf of the Crown. Formally it consists of the Governor General *acting* on the advice of the Committee of the Privy Council, which has the same membership as the cabinet. It is, however, distinct from the cabinet, which is both informal and cannot in legal terms authorize action in the system. Put simply the cabinet determines the policy of the government, and that policy is effected either by a minister or by the Crown. If the latter, the Crown in order to take action usually must be authorized to do so by the Governor in Council. Although until 1951 the Treasury Board conducted all of its business subject to the approval of the Governor in Council, the Treasury Board was not originally constituted as a committee of the Privy Council. The Minute of the Council of 2 July 1867 recommended that a 'Board of treasury be constituted with such powers and duties as may from time to time be assigned to it by Your Excellency in Council'. Thus at the outset the Board had the potential to *act* rather than *advise*, and it was only when the Board was provided with a statutory base that it was constituted as a committee of the Privy Council, sharing the *advisory* functions of its parent body. Accordingly, from 1869 until 1951 the Board advised and the Governor in Council acted. In 1951 the *Financial Administration Act* authorized the Board to act for the Governor in Council in order to reduce the flow of formal paper through the Council. The Board remained, however, a committee of the Privy Council, even though unlike the latter it exercised executive functions. (To draw the parallel it should be noted that although the Special Committee of the Council acts for the Committee of the Privy Council in approving draft submissions to Council, the special committee does not itself take action, which may be said to occur when draft orders are approved by the Governor General, thereby

The original Treasury Board was chaired by the Minister of Finance, and consisted 'for the present' of the Minister of Customs, the Minister of Inland Revenue, and the Receiver General.¹⁰ ✓ The activities of the Treasury Board were supported by the department of Finance, which placed the Minister of Finance in a position similar to that of his British counterpart, the Chancellor of the Exchequer. The Minister of Finance was required, therefore, to work closely with the prime minister in fulfilling the basic duty of the Board ministers to reconcile conflicting demands for money from their cabinet colleagues.¹¹

Until 1947, the Deputy Minister of Finance was also the Secretary of the Treasury Board, and it was largely his function to ensure that consolidated estimates were prepared. In this respect, ✓ our history paralleled developments in Whitehall where at about the same time (1860's) the functions of the Treasury commissioners were being taken over by the Chancellor of the Exchequer and his officials, permitting the Treasury Board to fall into disuse.¹² Over time, however, we were to move in the opposite direction from the British. The role of the Treasury Board ministers was strengthened, ultimately separating the Board's secretariat from the department of Finance and providing the Board with a chairman (the President) separate from the Minister of Finance. These changes spanned 100 years of our constitutional development.

Financial control exercised by ministers collectively through the Treasury Board opened the way for the establishment of management and other administrative standards on a central basis. ✓ From the outset, the Minister of Finance through the Treasury Board assumed certain *de facto* powers that affected the management of individual departments. The Treasury Board, responsible

fulfilling the legal requirement for action by the Governor in Council.) The reasons for this anomaly may be found among the prime minister's prerogative powers, because as a committee of Council the Treasury Board's actions remain subject to the intervention of the prime minister. Had the Board been given executive authority and not remained a committee of Council, its chairman would in theory be able to exercise the authority of the Board without reference to the prime minister. This evidence of the prime minister's power in matters of finance illustrates the importance of finance to the solidarity of the ministry and the origins of the prime minister in using financial authority to help forge consensus among his colleagues.

¹⁰ Minute of the Privy Council, approved 2 July 1867. *Privy Council Minute Books*, Public Archives of Canada.

¹¹ See Norman Ward, *The Public Purse* (Toronto, 1951), p. 233.

¹² Anson notes 'As the Treasury Board has diminished, so the Chancellor of the Exchequer has risen in importance. At the present time he is in fact a Finance Minister, with most important duties, and the Board of which he is a member consists of persons whose duties are unconnected with the work of the Treasury, the chief of them being the Prime Minister.' *Law and Custom of the Constitution* vol. ii, pt. i, p. 192. Also see below p. 14.

for reconciling estimates, was in theory also concerned that the unity of the ministry not be made vulnerable in Parliament through the exposure of corrupt or inefficient practices in departments. As noted earlier, this function was well established in the 18th century Treasury in England, which was looked to by Parliament to provide assurance that such practices were vigorously safeguarded against. The *Finance Act of 1869* set out clearly the powers of the Treasury Board with respect to matters of finance and expenditure, and by implication of management. These responsibilities have since been elaborated in a series of important Acts designed to improve the standards of resource management and to eliminate careless, wasteful, and corrupt practices. Each of these successive Acts has sought to strengthen the Treasury Board's ability to provide a framework for the management of the public service that will reassure Parliament that the service is being managed efficiently.

The Treasury Board's management functions had been fulfilled somewhat haphazardly over the years prior to the formation of Mr. Bennett's administration in 1930.¹³ Estimates had been reconciled, and corrupt practices eliminated. Not much had been done, however, to standardize financial expenditure and accounting systems, and overspending of votes and other unauthorized expenditure was not uncommon. Parliament, more particularly the Public Accounts Committee, had shown little interest in improving the system.¹⁴ Mr. Bennett, who was also Minister of Finance, was disconcerted to discover that owing to widely differing standards and systems of accounting he could not determine the financial position of the government.

These circumstances precipitated the *Consolidated Revenue and Audit Act* of 1931, which imposed a highly centralized system for authorizing expenditure and a standardized accounting system. The Act created the subordinate position within the department of Finance of Comptroller of the Treasury. This officer was provided with a staff of *accounting officers* stationed in each department.¹⁵

¹³ In fact, most of its function had been fulfilled by the Minister of Finance. Sir George Murray, a former Permanent Secretary of the Treasury at Whitehall, who had been commissioned in 1912 to report on the organization of the government, recommended that the Board should be abolished and its duties carried out by the Minister of Finance. See Sir George Murray, *Report on the Organization of the Public Service of Canada* (Ottawa, 1912), sessional paper 57a, p. 9.

¹⁴ Norman Ward has noted that it was not until the late 'forties that the Public Accounts Committee 'had finally shaken off its antique obsession with scandal'; *The Public Purse* p. 216.

¹⁵ *An Act to amend the Consolidated Revenue and Audit Act*, section 36. 21-22 George V, ch. 27. It is interesting that this section was not retained in the *Financial Administration Act* of 1951.

The Comptroller and his staff, responsible to the Minister of Finance, were responsible for authorizing each expenditure made under the authority of a particular minister.¹⁶

The Bennett reforms ushered in a period of highly centralized financial control that spanned the succeeding 35 years. They were occasioned by hard times and stringent economies, but they also reflected a chronic weakness in departmental financial systems due to the absence of uniform systems for expenditure and accounting. The reforms were, however, somewhat repugnant to the principles of responsibility in the system.¹⁷ As times improved, as government activity grew, and as ministers increasingly exercised their program authority, the appropriateness of this centralized system was called into question. The Glassco Royal Commission's theme of 'let the managers manage' precipitated amendments to the *Financial Administration Act* in 1966 that set in place the organizational and financial relationship that currently exists between the Treasury Board and ministers in their departments. Summarizing the developments that had occurred since 1931, the Commissioners noted.

By divesting departments of the authority essential to the effective management of their own affairs, the system tended to weaken their sense of responsibility. Each new evidence of irresponsibility within departments seemed to confirm the wisdom of existing controls and to suggest the need for more.¹⁸

The Commission argued in effect for a reassertion of ministerial authority. It proposed the separation of the Treasury Board's secretariat from the department of Finance and placing it under the leadership of a secretary with the rank and status of a deputy minister, the appointment of a separate minister to preside over the Board, and the substitution of management leadership and Treasury Board prescribed standards for the control functions

¹⁶ For an excellent description of the Bennett reforms, see Norman Ward, *The Public Purse* pp. 167-172. Professor Ward notes that the role of the Comptroller's officers as accounting officers was substantially the same as the role of permanent secretaries as accounting officers in Whitehall, except for the crucial difference that in Whitehall they were—and still are—generally responsible to the minister under whose authority the expenditure was made, even though they were specifically accountable to the Treasury for financial matters. See below pp. 1-51 to 1-55.

¹⁷ The drafters of the 1931 amendments were obviously sensitive to criticism on this score; section 31 contradicted the consequence of the Act as a whole in stating that 'No provision of this Act shall be construed to limit the responsibility of ministers, deputy ministers, departmental officers or other persons charged with the administration of grants of Parliament.' 21-22 Geo. V, ch. 27.

¹⁸ *Royal Commission on Government Organization* (Ottawa, 1962), vol. i, p. 44.

exercised by the Comptroller of the Treasury.¹⁹ These recommendations were incorporated in the 1967 amendments of the *Financial Administration Act*, which reinforced the role of the Treasury Board in setting management standards for the public service.

The system presided over by the Comptroller of the Treasury between 1931 and 1967 operated to the detriment of ministerial responsibility with adverse consequences for the exercise of constitutional responsibility and (as evidence of this) for the flexibility and responsiveness of government. During this period the idea of accountability disappeared and was replaced by the system of controls criticized by the Glassco Royal Commission. The post-Glassco reforms initiated a trend away from a highly centralized system based on controls and a move towards greater freedom for the exercise of ministerial autonomy, and since 1967 the Treasury Board and its secretariat have sought to elaborate a role more appropriate to the needs of ministerial government.

The Public Service Commission

A discussion of collective institutions (i.e. central agencies) must include reference to the Public Service Commission. Unlike the cabinet and the Treasury Board and their supporting organizations, the Commission is neither of the ministry nor is it its agent. The Commission is a strange hybrid.²⁰ The Treasury Board exists in part to ensure probity in the use of financial resources because lack of probity will undermine confidence in ministers. The Commission, in carrying out its role to ensure probity in appointments, fulfils an important function in preventing abuses that could *inter alia* undermine confidence in ministers. Although the consequences for collective responsibility flowing from the activities of the Board and the Commission are similar, the obligations of the Commission are to Parliament rather than to the ministry. In the wider context of parliamentary control of resources, this similarity illustrates the interest held in common by Parliament and the

¹⁹ *Royal Commission on Government Organization* vol. i, pp. 55-56. In fact the Commission proposed that the Secretariat be transferred to the Privy Council Office, thereby emphasizing the Treasury Board's *de facto* role as a committee of the cabinet and stressing the prime minister's primordial concern with finance. The recommendation was resisted because it would have distorted the service role of the cabinet secretariat, because the concentration of so much authority in a single central agency would have unbalanced the relationship between departments and central agencies, and because the equilibrium among central agencies is itself essential to the well-being of the system as a whole.

²⁰ For a summary of the events leading to the establishment of the Commission in 1908 and its subsequent relations with deputy ministers and the Treasury Board, see J. E. Hodgetts, *The Canadian Public Service* (Toronto, 1973), pp. 263-286.

ministry to ensure sound personnel and financial management in the public service. ✓

In setting standards of selection and promoting the concept of a unified public service with careers spanning the entire range of federal activity, the Commission endeavours to provide ministers and their deputies with the best human resources available. In fulfilling its duty to ensure merit in appointment, the Commission safeguards ministers from the politically damaging effects of patronage. The advantages of a unified public service could, however, become disadvantageous if the service took on objectives separate and distinct from those of the individual ministers whom its members serve. In pursuing the objective of a unified professional public service, the Commission plays a difficult role that must neither centralize nor balkanize the service. Indeed, as with the central agencies proper, the Commission must guard against the evils of attempting too much or doing too little.²¹

Conclusion

The central agencies play, therefore, an essential role in the successful functioning of ministerial government. They enable the confederacy to work. They pull the system together, synthesizing and co-ordinating, occasionally leading. When necessary, and this is particularly true of the special policy functions of the departments of Finance and External Affairs, they give direction in the development of matters of general concern to all ministers.²²

As has been noted, however, the distinction between serving the collective need without damaging the individual has not always been observed or even recognized, and this has been particularly true in the financial area. Indeed, it is probable that the absence of adequate financial accountability in the system stems from the long period of highly centralized management control experienced between 1931 and 1967. During those years central control displaced the need for financial accountability. At the same time the

²¹ For fuller discussion of the Public Service Commission, see the accompanying paper 'Senior Personnel in the Public Service'. (Submission 3).

²² Examples that come readily to mind are the role of the Minister of Finance in determining the appropriate level of government spending within the context of the national economy, and that of the Secretary of State for External Affairs in setting the political framework within which his colleagues will operate in their international dealings.

functions of government were growing. In consequence when central financial control was eased the system had forgotten the importance of accountability and had become too used to looking for central direction, which is a phenomenon that has remained in the system and accounts in part for the uncertain relationship that is current between departments and central agencies.²³

Nonetheless, successfully worked, the mechanisms for collective responsibility make possible the effective exercise of individual responsibility, and the degree of success achieved by 'central agencies' determines in large measure whether ministers are able to provide successful government based on the effective exercise of their authority.

²³ Examples of this are seen in the failure of many departments to distinguish between directives and guidelines issued by central agencies, and in the tendency to urge operational roles on these organizations.

VI

MINISTERS AND THEIR DEPARTMENTS

The Minister

The legislative bases for the departments of government make explicit the individual responsibility of the ministers who preside over them, and as has been noted, provide one of the legal bases of the minister's responsibility. The way in which the minister fulfils this responsibility and is called to account for the exercise of his statutory authority is subject to practice and convention. All departmental acts provide for the formal appointment of the minister by the Crown (informally on the advice of the prime minister), set out the powers, duties, and functions for which he will be responsible, and give him the management and direction (control and supervision) of the financial and public service resources deployed in the department.¹ These statutory provisions are given life through the conventions of the constitution, which determine at any given time the way in which the minister fulfils his role and the circumstances of his answerability to Parliament for his actions, and offers further safeguards through the conventional responsibility of ministers collectively.

The individual responsibility of the minister requires that he be personally responsible for the activities carried out under his authority. This concept is fundamental to the long struggle to impose responsibility on the exercise of power. Parliament has

¹ In theory, ministers may be said to have the 'management and direction' of their departments for which purpose they have the 'control and supervision' of the public service resources deployed within it. In practice, however, the phrases are used interchangeably in the statutes, which support neither this nor any other distinction.

insisted that ministers be directly accountable to it by being part of it. The minister is, therefore, assailable on a daily basis for his actions and those of his officials. The traditions of civil service anonymity built up in England during the later part of the 19th century, and the creation in Canada of the Civil Service Commission in 1908 to ensure that public servants would be non-partisan, reinforced this principle.

Officials are disqualified from membership in the House of Commons and accordingly may not be held constitutionally responsible by the House. It is worth noting that it was not until the close of the 18th century in England that individuals whom we would recognize as permanent officials were barred from Parliament.² Indeed, not until this happened was it possible to identify the beginnings of a civil (as distinct from political) service. It is also worth noting that the exclusion of officials from the House and hence from constitutional responsibility for their actions was accompanied by organizational change that had the effect of concentrating the civil service in departments, each presided over by a minister who could be held personally responsible for the actions of his officials. This development was marked in the early to middle part of the 19th century by the substitution of the personal responsibility of a minister for the 'indefinable and irresponsible authority of boards'.³

The subordinate quality of officials as distinct from the responsible estate of a minister is most clearly seen in the two types of boards and commissions that survived these changes. First, there are those such as our Treasury Board that consist solely of ministers. Second, there are boards, such as our Defence Council and the Admiralty Board in England (both now defunct), presided over by a minister personally and solely responsible for the activities of the board whose other members are officials, advising rather than deciding.⁴

As the number of officials increased, the importance of ministerial responsibility grew proportionately. Today more than

² Parris, *Constitutional Bureaucracy* p. 34. The membership of these 'officials' indicated that the part of the *Act of Settlement* of 1701 that barred officer holders from the House of Commons was a dead letter.

³ Birch, *Representative and Responsible Government* p. 141.

⁴ When the Board of Admiralty was reconstituted in the 1860's the ministerial responsibility of the First Lord was made explicit, he being empowered to decide 'without reference to any vote or equality which may exist under the present board system'. Parris, *Constitutional Bureaucracy* p. 93. These comments do not, of course, apply to boards and commissions that have been separated from the purview of ministerial responsibility because they fulfil regulatory, quasi-judicial, or related functions.

ever the actions of civil (or as we now call them public) servants are numerous and often far-reaching in their effect, and the presence of a minister charged with responsibility personally to answer for their actions is essential if constitutional responsibility is to be maintained.⁵

The principles of responsibility, the concentration of the Crown's power in the hands of ministers, the subjection of ministerial power to Parliamentary control, and the limited capacity of Parliament itself to assure the justice of official actions, reinforce the responsibility of ministers, requiring them to be in a position to assure the House that they are exercising power responsibly. The constitutional responsibility of ministers is clear, but their ability to speak confidently of the actions of their officials is a matter for constant attention. It is in this context, and in the light of the history and implications of the constitutional manifestations of responsibility in parliamentary and cabinet government, that the accountability of officials must be considered.

The Deputy Minister

Deputy ministers have duties that reflect the nature of cabinet government. The deputy minister is the most senior official of the minister, to whom he is responsible. He may, by delegation, exercise virtually all of the minister's powers. The deputy's responsibility to his minister reflects the individual and collective responsibilities of the latter, and, because of the significance of his minister's collective responsibility, the deputy also has certain obligations to the prime minister and (through his minister) to the ministry as a whole.

The roles of deputy ministers are complex, but they must ultimately unravel to support the responsibilities of ministers, and, as with ministers, the roles of deputies that reflect the individual responsibilities of ministers form the bedrock of responsibility and hence accountability in the system. But the system would be unstable without the collective responsibility necessary to cabinet solidarity, and the deputy must also play a role in and be affected

⁵ Sir William Harcourt, a 19th century British Chancellor of the Exchequer, described this relationship as between ministers and officials more tersely: 'The value of the political heads of departments is to tell the permanent officials what the public will not stand.' A. G. Gardiner, *The Life of Sir William Harcourt* (New York, n.d.), vol. ii, p. 587.

by means that are used to ensure the maintenance of collective responsibility among ministers.

The individual and collective responsibilities inherent in cabinet government create a system that operates through a series of countervailing forces. Balancing the individual responsibilities of ministers encourages consensus and forms the basis of stable ministerial government. The deputy minister, like his minister, faces and must find ways of resolving potential conflicts between his minister's individual responsibility and his obligation to support the collective wishes of his colleagues.

In order for deputies to fulfil their roles in a responsible manner and to be held accountable for their performance, it is necessary that deputies understand their role in government and the duties that devolve upon them by virtue of the individual and collective responsibilities of their ministers. Deputies must also have access to means of resolving apparent conflicts between countervailing responsibilities and loyalties within the ministry so that they can function effectively as policy advisers and administrators for their ministers individually, and in doing so contribute to the solidarity of the ministry.⁶ They must, in short, understand how responsibility in the constitution affects them.

The Deputy and the Minister's Individual Responsibility

✓ Deputies, like their ministers, are provided with a statutory base for their appointment in the departmental statutes. Unlike their ministers they are appointed formally not by the Crown, but by the Crown on the advice of the ministry as a whole. This provision perpetuates the conventional control of the prime minister over senior public offices. It also indicates something of the broader role that deputies play *vis-à-vis* the ministry as a whole.

Although departmental statutes are silent on the subject, the *Interpretation Act* is clear that the deputy may exercise the power of a (i.e. his) 'Minister of the Crown to do an act or thing' except

⁶ The cabinet is an instrument that provides ministers with such means for the resolution of matters of common interest to them. Deputies (and to a degree ministers) rely in part on senior interdepartmental committees for this purpose, and central agencies have a particular responsibility to use these committees and other means (such as encouraging deputies to consult bilaterally with their opposites in charge of the central agencies) to assist deputies in solving multi-jurisdictional problems.

'to exercise any authority . . . to make a regulation'.⁷ This statutory interpretation makes explicit the legal accountability of deputies to their ministers that is implicit in the departmental statutes.⁸

Accordingly, with the authority of the minister, the deputy may exercise the powers of the minister set out in the departmental Act and by extension in the other Acts for which the minister is responsible. The deputy also fulfils the minister's obligation to manage and direct the department and has the control and supervision of the financial, personnel, and other resources at its disposal.⁹

The duties of the minister are set out in the statutes and are usually very general in character, leaving it to the minister to propose specific means of fulfilling them; these are then presented to Parliament in the estimates for its approval. If the minister wishes to seek an appropriation for a program whose provision is not covered in the general duties set out in the departmental Act, it is usually necessary for the minister to seek the necessary authority through legislation. Normally, however, the duties described in the minister's acts cover a wide variety of functions, ranging from policy formulation and program development to program implementation and departmental administration. These functions, whether policy, program, or administration, may be devolved upon the minister's senior permanent adviser in the latter's quality as the minister's deputy.¹⁰

In 1929, during his testimony before the Tomlin Commission on the civil service in England, Sir Warren Fisher, who was then Permanent Secretary of the Treasury, head of the service, and a

⁷ *Revised Statutes of Canada* (Ottawa, 1970), vol. iv, c. 1-23. Nor may a deputy substitute for his minister in the latter's role as spokesman in the House of Commons.

⁸ The congruence between what is explicit in statute law and what is implicit in the law and custom of the constitution is worth noting because it is not always the case. Custom is composed of practice whereas law may set a precedent, and in administrative matters our system usually prefers to let precedent evolve into practice before thought is given to casting into law the practices that have prevailed as a matter of custom. In administrative matters the law of the constitution usually evolves in this cautious manner, but not always, and sometimes precedent established at a given moment as a matter of law is at variance with the custom that has evolved through long-standing practice.

⁹ In practice, however, the deputy does not sign Treasury Board submissions involving new money or matters of policy. By custom and as a matter of policy these must be signed personally by the minister, which provides another manifestation of the practical exercise of his individual responsibilities. See *Treasury Board Circular 1968-71*, 18 September 1968.

¹⁰ There are certain exceptions to the rule that deputies act as agents of their ministers. Sections 24, 25 and 27 of the *Financial Administration Act* place certain financial duties directly in the hands of deputies, and section 7 of the same Act empowers the Treasury Board to delegate to deputies any of its powers and functions having to do with personnel management. Section 6 of the *Public Service Employment Act* gives similar powers of delegation to the Public Service Commission. These are significant exceptions that emphasize the special management responsibilities of deputies. There are also certain other acts that confer directly on deputies (and for that matter other officials) powers that are thought undesirable for ministers to be required to exercise.

vigorous opponent of the concentration of authority in central agencies, at the expense of departmental autonomy and ministerial responsibility, summed up the role of a deputy minister and the nature of delegation between a minister and the permanent head of his department with the observation that the permanent head 'is not (except by accident) a specialist in anything, but rather the general adviser of the minister, the general manager and controller under the minister, with the *ultimate* responsibility to the minister for *all* the activities of the department (and of its officials)'.¹¹

The Deputy and the Minister's Collective Responsibility—Policy

The deputy's relationship with his particular minister does not stop with the latter's purely individual responsibilities. Through his minister's collective responsibility, the deputy minister has a direct and well-established link between the office he holds and the ministry as a whole.

It was noted earlier that as the Crown retreated from active political involvement, and as monarchical government was effectively replaced by ministerial government, it became necessary to find means of stabilizing the provision of a form of government that was based on the collective views and leadership of a group of individuals. The position of prime minister and the institution known as the cabinet (and later its structured system of committees and secretariats) emerged as a means of providing such stability. The prime minister built his position from the application of his powers over government finance from which (loosely speaking) flowed his ability to control appointments to high office. Control of finance and high office introduced stability to ministerial government, and made possible the evolution of collective responsibility over a 150 year period in the 18th and 19th centuries. The exercise of these powers remains the basis of stable government in the system.

The system depends upon the prime minister's ability to promote consensus among his colleagues in two principal areas: the

¹¹ See Jennings, *Cabinet Government* p. 96. This was an accurate statement of the deputy's responsibility in a ministerial system and therefore significant coming from the Treasury with its centralizing tendencies. Fisher had sharply reminded the Commissioners that he was not by background a 'Treasury man'; see Roseveare, *The Treasury* p. 253.

policy of the government, and the management of the financial and hence personnel resources provided by Parliament annually for carrying out that policy. Policy and administration are not, however, mutually exclusive processes. They should be reliant on each other, and the deputy minister plays an important role in ensuring that they are.

The prime minister exercises a variety of informal powers, most of which are directed to ensuring the solidarity of the ministry. His powers of appointment over ministers and deputies are particularly important and are of principal concern for our purposes. They should, however, be considered with reference to the prime minister's duty to promote consensus among his colleagues, for which purpose he provides them with the cabinet, endeavours to set the tone of government and its broad lines of policy, organizes the general structure of government, arbitrates disputes among ministers, and (with or without consulting some or all his colleagues) determines when to seek a dissolution of Parliament.¹² The exercise of these prerogatives enable the prime minister to promote the solidarity of the ministry and his leadership of the government, and the appointment of ministers and deputies should be seen in this context. Deputy ministers are, of course, responsible to their respective ministers, but their appointment by the prime minister reinforces their commitment to ensure the successful functioning of ministerial government.

The tone of government may be set by the prime minister and the cabinet, but most of the policies of the government flow from the exercise of the individual responsibilities of ministers. With rare exceptions these policies are initiated by ministers and their deputies, co-ordinated at the official level through a network of interdepartmental committees and by other means, discussed by ministers and deputies in committees of the cabinet, finally

¹² See Jennings, *Cabinet Government* ch. viii, esp. pp. 153-154. In a departure from custom, Sir Charles Tupper in 1896 sought to impress his authority on his colleagues by having Council adopt a minute enumerating the powers of his office. In brief, the minute stated that the prime minister called meetings of the cabinet, recommended the dissolution and convocation of Parliament, and the appointment of Privy Councillors, ministers, deputy ministers, lieutenant governors, provincial administrators, chief justices of all courts, the Speaker of the Senate, senators, membership of the Treasury Board and cabinet committees, and parliamentary appointments in the gift of the Crown. The minute also made the interesting assertion that whereas a minister could not make a recommendation affecting the discipline of a colleague, the prime minister could make recommendations in any department (*Minute of the Privy Council*, 12 May 1896). The minute was reissued substantially unaltered by Messrs. Laurier, Meighen, Bennett, and King. Although not reissued since, it is now regarded as conventionally established. See also Mallory, *The Structure of Canadian Government* pp. 87-88.

resolved by ministers themselves in the cabinet, and given effect through the exercise of the individual responsibilities of the minister or ministers involved. The intimate way in which deputies interrelate with ministers on matters of policy illustrates one means by which deputies support the collective responsibilities of ministers.

The individual responsibility of a minister is virtually always exercised in relation to the individual responsibilities of one or more of his colleagues. This is particularly true as government activity has grown and programs have become more complex and interdependent. The function of providing necessary co-ordination usually falls to the deputy and his officers, and in carrying it through they find themselves sharing their minister's concern that particular initiatives will be supported administratively by colleagues whose co-operation is essential to success.¹³ This administrative co-ordination (referred to earlier in the context of the interaction between officials in support of the responsibilities of ministers in our confederal system) has become increasingly complex since the Second World War. The need to co-ordinate the responsibilities of several ministers in order to take particular initiatives is now the rule rather than the exception, and this is reflected in the growth of the co-ordinating functions of the cabinet.

Although strictly an unofficial and political body for the forming of consensus among ministers on matters whose substance may be tested in the House to determine whether collective responsibility has been applied, the cabinet is also used to co-ordinate the policy administrative activities of particular ministers whose individual responsibilities must be exercised in concert in order to effect particular actions. These policy administrative (as distinct from political) co-ordinating functions are most obviously manifested in the committee system that supports the work of the cabinet.¹⁴ The cabinet committee system requires that all memo-

¹³ This administrative co-ordination, as distinct from political consensus forming, is not strictly speaking an integral part of collective responsibility. In theory, co-ordination may necessarily extend only to those of a minister's colleagues whose administrative co-operation is required to carry forward an initiative. The line, however, between administrative and political co-ordination is seldom precise, and with the growth of governmental activity and the increasing use of the cabinet for administrative as well as political co-ordination, it has become increasingly difficult to make this distinction.

¹⁴ For a description of the committees and how they operate, see R. Gordon Robertson, 'The Changing Role of the Privy Council Office' *Canadian Public Administration* (1971) vol. xiv, no. 4. The structure of the committee system is largely unaltered, and the process is as described by Mr. Robertson except for the role now played by the Treasury Board.

memoranda from ministers be considered by a committee of the cabinet before they are referred to the cabinet itself, and, if they involve new expenditure, the committee reports on such memoranda are referred first to the Treasury Board. The committee and Treasury Board reports are then taken up by the cabinet. At each step, apart of course from discussion in the cabinet, deputies are required to support their ministers, accompanying them to cabinet committees for the discussion of particular items, and, earlier, by smoothing the way through the activities of the interdepartmental committee system as well as in less formal ways. These procedures, and the complexity of the policy issues that they reflect require the deputy minister more frequently than before to support his minister in the exercise of the latter's collective responsibility.

Moreover, the deputy is responsible for ensuring that the 'decisions' of the cabinet are carried into effect. It is worth reiterating that in our system authority flows from the Crown to ministers individually, and with certain exceptions where the Crown must act on the advice of ministers collectively, most actions are the personal responsibility of a particular minister or ministers. The 'decisions' of the cabinet have political and administrative rather than legal effect, and their enforcement is left almost entirely to the minister or ministers directly responsible. Indeed, proposals to vest the Privy Council Office and the Treasury Board Secretariat with 'follow-up' authority have generally been regarded as incompatible with ministerial responsibility and alien to the informal and political functions of the cabinet in the system. In a very real sense, therefore, deputies are relied upon to exercise the responsibilities conferred on them by their particular ministers in accordance with the consensus formed by all ministers in support of the collective responsibility of the ministry.

The Deputy and the Minister's Collective Responsibility—Management

Important as are the deputy's policy advisory and co-ordinating functions, he has a special responsibility for the management of resources, and here in practice he acts almost entirely in the place of the minister.¹⁵ In supporting his minister's individual

¹⁵ See above pp. 1-38 to 1-40.

responsibility by managing departmental resources to produce policies and programs, the deputy observes management standards that have been prescribed by ministers collectively and which are judged essential to the unity of the ministry. These standards are established by the Treasury Board and flow directly from its power of finance in the reconciliation of estimates.

It was noted earlier that finance was one of the principal tools used to establish the position of prime minister and hence the collective responsibility associated with modern cabinet government. The evolution of the constitution in the 18th century contributed a number of practices that have since taken on the force of convention and in some cases of law, and which have reinforced financial control (and hence the maintenance of particular management standards) as an essential aspect of collective responsibility. Foremost are the rules that the prime minister will approve the measures that will be presented to Parliament,¹⁶ that estimates must be presented on behalf of the Crown as the agreed proposals of the government, and that only the ministry may propose money bills.

The necessity that the ministry approach Parliament for funds as a collectivity requires that in reconciling estimates the Treasury Board set management standards in accordance with which each minister's statutory responsibility for the management and direction of his department, and for the control and supervision of the personnel, financial, and other resources deployed within it, must be exercised. The role of the Treasury Board as a committee of departmental ministers advising ministers collectively on the content of the estimates does not diminish the individual responsibility of the minister to Parliament to administer his department and its programs with the funds appropriated each year for these purposes. It is indeed essential to constitutional responsibility that ministers (acting through their deputies) manage and direct their own departments. Nonetheless, the requirement that ministers manage their departments in accordance with centrally prescribed

¹⁶ Anson takes the view that the prime minister has a 'decisive voice in the measures to be submitted . . . to Parliament'; *Law and Custom of the Constitution* vol. ii, pt. i, p. 124. Jennings is less sweeping, noting 'If, as is usual, he is leader of the House of Commons, he is, subject to the determination of the priority of proposals by the Cabinet, in control of the business of the House, through the Government Whips'; *Cabinet Government* p. 155. In Canadian practice, the prime minister (or in his absence the next most senior Privy Councillor of the ministry) signs draft bills before they are introduced in Parliament. This procedure may be said to reinforce the prime minister's 'decisive voice' in determining the government's legislative program.

standards and practices imposes a particular obligation on the deputy to ensure that this aspect of his minister's collective responsibility is adequately supported.

Because much of finance is a matter of policy, the financial functions of the Treasury Board are of direct concern to ministers working closely with their deputies in the essential task of reconciling estimates, which in turn is central to the establishment of collective responsibility. Once resources have been allocated, however, the management of the department and the observance of centrally prescribed management standards must in practice fall almost exclusively on the deputy minister, even though in law the minister is responsible.

The deputy must endeavour to administer his minister's department in order best to serve the application of existing policies and programs and their future development as well as the concern of the ministry as a whole that adequate financial and other management standards are observed. The interaction of these requirements, like the reconciliation of the minister's individual and collective responsibilities, should enhance rather than conflict with the ability of the deputy to manage effectively. In the extreme, of course, if the deputy cannot reconcile the requirements of the administration of his department and its programs with centrally prescribed standards and practices, either he must go or the centrally prescribed standards must be adjusted.

It is evident, however, that just as cabinet government is devoted to the development of consensus among ministers that will reconcile their individual and collective responsibilities, so there must be a reasonable balance struck between the administrative needs of a minister's department and those of the ministry as a whole as determined on its behalf by the Treasury Board. Because it is essential to constitutional responsibility that ministers (through their deputies) manage their own departments, and because they do so in accordance with certain standards judged necessary for sound management and hence the unity and survival of the ministry, it is also essential that ministers as a group have an adequate voice in the establishment by their colleagues in the Treasury Board of the standards and practices that they will be required to observe in their departments. In addition, because management falls almost exclusively on the shoulders of the deputy, it is necessary that as a group, deputies be in a position to influence the central standards that they will be required to

implement and for whose observance they will be held accountable. For the Treasury Board's Secretariat, as for other central agencies, this requires that a delicate balance be struck so that the constitutional requirement that each minister manage the public service resources deployed in his department will be reinforced and not weakened by the conventional requirement for the establishment and observance of centrally prescribed management standards. Above all it is essential that central agencies conscientiously avoid any action that would have the effect of arrogating to them the line responsibilities of ministers, whether in matters of policy or of administration. The danger of this sort of thing occurring is greatly increased if the standard-setting role of central agencies becomes control-oriented, and the best means of guarding against this happening is to ensure that equilibrium is maintained throughout the system. In management matters, responsibility for the maintenance of this equilibrium must be shared between deputies and the appropriate central agencies, each acting on behalf of ministers, and each recognizing that the management of the public service is the special responsibility of the deputy minister.

The balance between the management of the public service by ministers and deputies, on the one hand, and the observance of central standards, on the other, or between the minister and the Treasury Board, or between deputies and the Treasury Board's Secretariat, tends to force each participant at each level to justify his actions. If however, the rule-making habits of central machinery lead central agencies to proliferate central standards, or if they become control-oriented, there is a danger that the individual responsibility of ministers and deputies (on which the system is built and from which accountability flows) will be eroded. Experience in the central control of resources, especially in the financial area in the period 1931-1967, indicates that unless ministers and their deputies have an adequate voice in the management of departments it is difficult to hold them accountable, and in the absence of accountability central control becomes inevitable.

VII

CONSTITUTIONAL RESPONSIBILITY AND ACCOUNTABILITY

Accountability in Parliamentary Government—the Minister

Accountability is a means of making responsible the exercise of power. In parliamentary government power resides in the Crown and is exercised by ministers. Power is concentrated in ministers both in its exercise and in their personal accountability to the House of Commons for its use. Our system does not control power by dividing it as in systems founded upon 'the division of powers', but by ensuring that those who exercise it are personally responsible for their actions.

The direct responsibility of ministers to Parliament on a day-to-day basis is the essential strength of our system.¹ Its vitality depends on the ability of ministers to answer for actions carried out under their authority. From the origins of our system, however, political circumstances rather than literal application of the principle of ministerial responsibility have governed the answerability of ministers. Critics of ministerial responsibility have noted that the chances of punishment through loss of ministerial office are few, and that the operation of this ultimate sanction is 'arbitrary and unpredictable'.² The fact is, however, that although ministers seldom lose office due to irresponsibility, the possibility of that occurring, and more important the embarrassment and political consequences of being caught out, are more than adequate sanc-

¹ See above pp. 1-1 and 1-2; also Parris, *Constitutional Bureaucracy* pp. 294-308; and Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution* (London, 1959), pp. 78-84.

² See Finer, 'The Individual Responsibility of Ministers' pp. 393-394.

tions.³ Parliament expects ministers to answer to it. Members look upon ministers as readily accessible spokesmen for their departments, and ministers strive to respond because they are constitutionally responsible and they fear the political consequences of making a poor showing.

The personal responsibility of ministers is strengthened by their collective responsibility, which helps internally to ensure the accountability of ministers for their individual actions. Indeed, although it is true that collective responsibility rendered obsolete the impeachment of ministers by Parliament, it replaced that practice with a requirement either to vote want of confidence in the ministry or (by threatening to do so) to persuade a prime minister to seek the resignation of a particular colleague whose continued presence might be considered an affront to the doctrine of individual responsibility on account of his actions or omissions, or which might force a vote of non-confidence in circumstances that the ministry as a whole was not prepared to accept. In short, the responsibility of ministers depends in good measure on the *will* of the House to hold them answerable.

Conclusion

Constitutional responsibility is, therefore, individual in character and governs the relationship between the minister and the House of Commons. The minister is responsible for all the actions taken under his authority. Although it is true that the degree in which he will be required to answer for the actions of officials will depend upon the political circumstances and whether an official has, for example, acted in a clearly unacceptable manner of which the minister had no knowledge, the fact remains that the minister is constitutionally responsible and this is essential in determining who answers for what and to whom in the system.

Accountability in Parliamentary Government—The Deputy Minister

✓ The responsibility of ministers is a constitutional principle whose quality is essentially political, being drawn upon from time

³ Indeed, although ministers may not lose office immediately as the result of some shortcoming, they are often demoted and sometimes dropped in subsequent cabinet shuffles.

to time in response to exposure of differences about policy or of wrong-doing or mismanagement in order to test the confidence of the House in the ministry. Although the possibility lurks behind every question put to a minister, and although the quality of his answers could weaken his or the government's position, even resulting in parliamentary or public enquiries or the withdrawal of the support of colleagues resulting in the minister's resignation, in many cases the minister's answerability is a matter of providing uncontroversial information where no real test of his responsibility is involved. ✓

— The pyramid of responsibility that rises up to the deputy and from him to the minister extends from the minister to Parliament. Parliament's constitutional concern is to assure itself that ministers have adequate control over their departments in order that they may answer for the activities carried out in their names. Parliament achieves this through a variety of mechanisms such as written and oral questions, motions for papers, study of the estimates, scrutiny of government bills, and review of the Public Accounts and the reports of the Auditor General. Officials, particularly deputy ministers, play an important role in many of these activities.

Officials are not of course constitutionally responsible, but they play and have played a role *vis-à-vis* Parliament that in some important respects complements the role of ministers. Although officials do not have constitutional responsibility nor share the responsibility of their ministers, they do share to a degree in the answerability of their ministers to Parliament. A traditional preserve has been established that protects officials from answering to Parliament on matters of policy or matters involving political controversy. Apart from the obvious reasons of political sensitivity, matters of policy and political controversy have been reserved more or less exclusively for ministers principally because political answerability on the part of officials would inevitably draw them into controversy, destroy their permanent utility to the system, and, indeed, undermine the authority and responsibility of their ministers. Ministers are, furthermore, most closely associated with policy, and conflicting views expressed by officials could give rise to chaos and embarrassment. Deputies may, however, in the presence of their ministers explain and answer questions having to do with complex policy matters, but they do not defend policy against political attack. In other matters, principally those having

to do with the administration of the department and its programs, officials answer directly on behalf of their ministers.

The answerability of deputies and other officials is rendered in the committees of both houses, and is best seen in the Public Accounts Committee, where it is now customary for officials rather than ministers to appear. In other committees officials are supposed to appear in support of the minister or his parliamentary secretary. The practice is that officials answer questions of administration directly, with the minister or parliamentary secretary (although regrettably sometimes neither is present) intervening if the proceedings threaten to turn into political debate, raising the possibility of the minister's responsibility being involved overtly.⁴

Officials are, therefore, in a sense accountable *before* parliament for matters of administration. This is a matter of observation. It does not detract from the responsibility of ministers, which will be invoked in cases where administration infringes on matters of policy or political controversy.⁵ Even in the days before officials answered before committees, it was normal for a minister to be accompanied by officials to brief him in answering administrative questions. This practice extended to the committee of the whole on supply, where for the first 70-odd years of this century the deputy regularly sat in conference with his minister when the department's estimates were under consideration. Nowadays committee of the whole is seldom used except for tax bills. Instead, officials appear before select committees, where they answer directly in the manner described.

⁴ When Mr. Pickersgill was Minister of Citizenship and Immigration he set out the following ground rules: "The view I have taken on what I should do is to use my own judgment when a question is asked as to whether it is the type of question I should take the responsibility of answering myself or the type of question I should ask one of the officers of the department to answer. I do not intend myself to answer questions which do not involve policy and which do involve detail, because I think it would be quite ridiculous for me to turn to one of these gentlemen here and ask him to whisper the answer to me. He is far more capable of giving the answer himself because I do not pretend to be an expert on the details of the department. However, I would like it clearly understood that any question which I wish to answer myself I have the right to answer exclusively." *Special Committee on Estimates Minutes of Proceedings and Evidence*, No. 1, 17 February 1955. For some of the history of officials appearing as witnesses at committees, see Norman Ward, *The Public Purse* pp. 62, and 267.

⁵ The distinction between policy and administration has been familiarly allegorized: 'Policy is rather like an elephant, you recognize it when you see it, but cannot easily define it'; see Edward, Lord Bridges (Secretary of the Cabinet in Whitehall, 1938-1945), 'The Relationship Between Ministers and the Permanent Departmental Head', *Canadian Public Administration* vol. viii, no. 3, 1964.

Conclusion

Officials are *accountable to their ministers*, who must answer to the House for their use of the authority conferred upon them in law and by virtue of their responsibility to the House of Commons. It is, however, possible to distinguish between a deputy's accountability to his minister for all that occurs under the minister's responsibility, and his accountability before parliamentary committees for administrative matters so long as they do not call directly into question the exercise of the minister's responsibility. The accountability of officials before parliamentary committees for administrative matters cannot be said to alter the *formal* and *direct* responsibility of the minister personally to Parliament for any matter within his discipline for which the House chooses to hold him answerable.

Accounting Officers

Practice at Westminster with regard to officials *vis-à-vis* Parliament is in some respects different from ours. At Westminster officials do not appear to give evidence before standing committees. When bills are considered (estimates are not referred to standing committees), the minister becomes a member of the committee and debate is carried on much as in the House of Commons. Witnesses are not called. Officials do, however, appear before select committees. This is particularly the case with the Public Accounts Committee, where ministers do not appear because the committee is administrative in its proceedings and non-partisan in its practices. The Public Accounts Committee, which generally meets in public, summons senior departmental officials to answer questions based on the reports of the Comptroller and Auditor General. These officials, usually the permanent secretaries, are appointed by the Treasury as 'accounting officers', and they are responsible for the probity and economy with which funds in their custody are spent.⁶

⁶ The appointment of permanent secretaries (i.e. deputies) as accounting officers recognizes that finance cannot be divorced from policy, and that accountability for financial matters can only be rendered by those responsible for providing ministers with policy advice. When the British system was established in the 1920's the Treasury successfully overcame the recommendation of a parliamentary committee to designate financial experts as accounting officers.

The basis for the 'accounting officer' is the *Exchequer and Audit Act* of 1866, which in section 22 established that the duty of preparing departmental accounts 'may be assigned by the Treasury' to 'any Public Officer or Officers'.⁷ This act, and the provision made in the early 1920's to designate permanent secretaries as 'accounting officers', perpetuated Parliament's long established practice of looking to the Treasury to ensure probity and economy in the use of resources. The practice whereby 'accounting officers', rather than ministers, appear before the Public Accounts Committee depends upon the non-partisan and administrative concerns of that committee, emphasizing that the accountability of accounting officers is *before* rather than *to* the committee and does not detract from the constitutional responsibility of ministers.

Similar if not as precise provision was made by Parliament at Ottawa in 1867. Sections 34 and 37 to 46 of the *Revenue Act* of that year set out the civil responsibilities and the criminal liability of specially designated officers for the custody and accounting of public money.⁸ The substance of these provisions was retained in successive consolidated revenue Acts, and was strengthened in the 1931 Bennett reforms through application to the Comptroller of the Treasury and his network of accounting officers. Sections 57 to 65 of the *Consolidated Revenue and Audit Act* of that year established in extensive and very direct terms the accountability of financial officers to the Minister of Finance for the expenditure and accounting of public funds, including their liability to pay costs and fines associated with the recovery of unauthorized expenditures.⁹ Although reference to the accountability of financial and other officers was removed when the *Revenue Act* was superseded in 1951 by the *Financial Administration Act*, the civil liability of such persons was retained, and remains part of the Act currently in force. Similarly, throughout the amendments to

⁷ *An Act to consolidate the Duties of the Exchequer and Audit Departments, to regulate the Receipt, Custody, and Issue of Public Moneys, and to provide for the Audit of the Accounts thereof* 29° and 30° Victoriae, Cap. 39. See also extract from a *Treasury Minute* dated 14 August 1872, in 'The Responsibilities of an Accounting Officer', *Note by the Treasury*, 17 February 1964.

⁸ *An Act respecting the collection and management of the Revenue, the Auditing of Public Accounts, and the liability of Public Accountants* 21 December 1867, 31° Victoriae, Cap. V.

⁹ *An Act to Amend the Consolidated Revenue and Audit Act* 21-22 Geo. V. ch. 27. See Norman Ward for a description of the similarities between the Whitehall reforms of the 1920's that established permanent secretaries as 'accounting officers' and the Bennett reforms at Ottawa of 1931; *The Public Purse* pp. 168-169.

successive revenue acts spanning the century from 1867 to 1967, criminal liability for embezzlement and the taking of bribes by public servants has remained a constant feature.¹⁰

It is clear, therefore, that the constitutional responsibility of ministers is not designed to protect the irreponsibility of officials. From the earliest days, Parliament has made specific the liability of officials for civil and criminal wrongs respecting their custody of public monies. In fact, the rule of law requires that any individual who violates the law must be legally responsible for his action. Dicey noted that 'every official, from the Prime Minister down to a constable or collector of taxes is under the same responsibility for every act done without legal justification as any other citizen'.¹¹

Conclusion

The civil liability of public officers for misappropriating funds and their criminal liability for fraud has a long history in Canada and may be said to be entrenched in the Common Law. Until 1951 specific provision was made for a system of accounting officers to ensure probity in the use of public money. In Canada accounting officers were responsible in law to the Minister of Finance, and today the 'accounting officer' in England is legally responsible to the Treasury. Their accountability before Westminster's Public Accounts Committee is a matter of *practice*, and it is a matter of observation that a not altogether dissimilar *practice* is current in Ottawa at the present time. The British practice is, however, better established, which in part at least is due to the non-partisan ground rules at Westminster that enable the Public Accounts Committee and the Treasury to work closely to improve the financial management system.¹² The committee is, in short, a

¹⁰ See *An Act for the Financial Administration of the Government of Canada, the Audit of the Public Accounts and the Financial Control of Crown Corporations* 15-16 Geo. VI, ch. 12, 1951, pt. ix; and R.S.C., 1970, ch. F-10. It is also worth noting that sections 24, 25 and 27 of the Act currently in force require deputy heads to maintain adequate accounting procedures to ensure that funds are not over-committed and that payments made are both 'reasonable' and according to contract.

¹¹ Dicey, *Law of the Constitution* p. 193. At p. 327 he notes that 'the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law'.

¹² Indeed the relationship often takes the form of collaboration. See Roseveare, *The Treasury* pp. 141, 202.

highly respected body, and its more important recommendations are periodically published as *Epitomes*, which are regarded as 'the standard text-book of financial administration'.¹³

The British institution of the "accounting officer" is recognition in the statute law of the civil and criminal liability of an individual for his personal actions. Convention and parliamentary practice has, however, enabled the institution to develop as a means of enabling Parliament to scrutinize and to some extent to control the exercise of administrative authority within the government. The convention that enables Parliament to hold officials rather than ministers accountable for administration lies at the heart of the value of the institution of the accounting officer, and is made possible by the non-partisan practices of the Public Accounts Committee.

As government has learned through the blurring of individual responsibility by the imposition of central controls, responsibility shared tends to be responsibility shirked. *Formal* and *direct* accountability of officials to Parliament for administrative matters would divide the responsibility of ministers. It would require the establishment of firm practices governing the sorts of questions for which ministers as distinct from officials would be answerable, and this would be reflected daily during Question Period. Experience indicates that such distinctions are artificial and that Parliament prefers not to recognize the informal division between the answerability of officials and of ministers for the very reasons that ministers are constitutionally responsible and that the extent of their answerability is defined by political circumstance. Furthermore, theology aside, such divided responsibility would be unsound management.

Administration and management of programs consists of carrying out policies based on political decisions. Programs have, of course, a technical administrative aspect, and these matters are usually dealt with by officials at parliamentary committees. The attempt, however, to identify discrete areas of official accountability to Parliament would likely result in the further blurring of lines of accountability, weakening the ability of the House to hold the minister responsible when it chooses for matters falling under his authority. This does not argue against the value of having officials

¹³ Jennings, *Parliament* pp. 337-338. See also de Smith, *Constitutional and Administrative Law* pp. 289-290.

appear and being held accountable before parliamentary committees on behalf of their ministers, and strengthening Parliament's capacity to examine officials and ministers more closely. Ultimately, however, ministers are constitutionally responsible because they (not their deputies) have the deciding word for which they alone can be held politically answerable.¹⁴

Ministerial Responsibility and the Congressional System

Accountability is a means of controlling the exercise of power. In parliamentary government constitutional responsibility requires (literally and figuratively) that ministers answer daily for their actions, and imposes a variety of sanctions if they fall short in their answers. There are, however, other constitutional means of controlling the use of power, based not so much on the principle of the exercise of power responsibly as on the limitation of power through its formal division. The best known of these is the congressional system, particular features of which are often promoted for incorporation into our practices. One such feature involves the "accountability" of officials to congressional committees.

What would happen to constitutional responsibility if the minister ceased personally to be exclusively responsible for his department and its activities? Could we divide constitutional responsibility between ministers and officials? The short answer is yes, but that in doing so we would also have to make extensive

¹⁴ It may be noted that historically Parliament has left detailed control of the purse to the ministry (see below pp. 1-11 and 1-29). In his report to the Borden administration in 1912, Sir George Murray plainly set out the facts. 'The control of expenditure may be considered from two points of view, there is the control exercised by the Government over its own Departments; and the control exercised by Parliament over the proposals of the Government. The latter may, I think, be regarded as negligible for the present purpose. In theory the control of Parliament over expenditure is complete, in practice it is of little value. This is partly due to the fact that, as the Government must necessarily command a majority in the House of Commons, it can generally secure the passing of its own estimates; and partly because notwithstanding many professions of a desire for economy in the abstracts [*sic*]. Members will generally be found demanding increased expenditure for purposes in which their constituencies are interested, rather than reductions on items which do not fall under this category. In short, the control of public expenditure must depend almost entirely on the Government of the day; and here again we shall generally find that individual Ministers, while not unwilling to acquiesce in the reduction of the estimates of other Departments, are *prima facie* disposed to recommend increased expenditure in their own.' Murray's solution to this age-old problem was tighter control by the Minister of Finance over the process of reconciling estimates. *Report on the Organization of the Public Service of Canada*, pp. 10-11.

changes in our system of government and set aside the historical evolution of our form of constitutional responsibility based on personal accountability.

Sometimes, those who doubt the continuing application of ministerial responsibility point to federal institutions in the United States, where the activities of government departments are scrutinized through the appearances of several levels of *politically appointed* officials before the committees of the Congress to defend the *policy* of the administration. It should be noted, however, that this scrutiny is not formal accountability since once appointed such officials may only be removed by the president unless the Congress resorts to the extraordinary measure of impeachment. In short, such officials are not constitutionally responsible. It is also important to stress that they are politically appointed and not intended to be non-partisan. Indeed, the appearance of officials to defend policy is the consequence of a governmental system based on a principle for the control of power completely different from that operating within parliamentary government. To achieve the same consequence in parliamentary government, we would need to re-examine the principles on which our system is built, starting with the origins of power and the nature of constitutional responsibility that form the basis of all of our arrangements.

Power in representative parliamentary government flows from the Crown, which exercises power responsibly according to the wishes of the legislature and the interpretation of the judiciary, both of which include the Crown as a constituent element. In the congressional system, however, power flows from the People. It is not controlled primarily by making it responsible (i.e. by holding those who use it accountable), but rather by limiting its scope and countervailing its operation—hence the separation of powers.

In giving limited power, congressional government endeavours to ensure that power cannot be grossly abused. It is important to understand that although the system involves important elements of *de facto* accountability of officials before the committees of the Congress, the system does not vest responsibility in these individuals regardless of their rank. Power is divided among the executive, the legislature, and the courts, three formally distinct and separate arms of the constitution. Once appointed to office by the president and confirmed by the Congress, members of the executive are formally accountable only to the president, who is the only exter-

nally accountable member of the executive, and except in the extreme he is accountable not to the Congress but to the People, from whom he and the constitution derive their power. In addition, because the executive is vested in one man, rather than in a group individually and collectively responsible, and because neither the president nor his advisers are members of the Congress, there is no collective responsibility and thus no overt internal pressure to ensure the responsible exercise of the executive's authority, which is checked in the last resort not by responsibility in its exercise, but by its inherent limitations.

The control of power by its division (rather than by making those who use it constitutionally responsible and daily and directly accountable to the representatives of the electorate) tends to weaken accountability for its use. The division of powers makes it difficult to focus responsibility or to hold individuals personally accountable. In any given area of major policy one finds a succession of players in the Administration as well as the Congress each of whom has a degree of responsibility and a share of power, but as a rule there is no one with ultimate responsibility for the exercise of all the power necessary to take action.¹⁵ An essential aspect of the division of power is the operation of countervailance among those exercising its various parts, and in the absence of constitutional responsibility vested in accessible individuals, the operation of countervailance in a system of divided powers makes it virtually impossible to hold individuals personally accountable, except in the narrow sense of prosecuting personal misconduct.¹⁶

Those who think that our parliamentary system is inefficient in transacting business have only to consider the congressional system to realize that parliamentary government is not the only slow-moving constitutional arrangement for the exercise of power. Under parliamentary institutions a government that has determined to act can expect to see its decision translated into action. In the congressional system this is not always so. A president (unlike

¹⁵ The president may, for example, propose a budgetary measure to the Congress, but the House Ways and Means Committee may modify it extensively or recommend something entirely different to the Congress, and short of exercising his veto the president may have to accept measures to which he is more or less opposed and which in any event he has not recommended. By contrast the proposals of the Minister of Finance may only be changed with his agreement, and the House may neither increase his taxing proposals nor introduce new ones. In the parliamentary system the budgetary policy of the government is, therefore, the clear and personal responsibility of the Minister of Finance, and he cannot blame the House or anyone else for its consequences.

¹⁶ The blurring of accountability may also be seen in the operation of the congressional committee system where powerful committees with influential clientele can in effect remove control of certain parts of the bureaucracy from the executive.

Good summary

a prime minister) may have security of office for four years, but he may not be able to persuade the Congress to do his bidding. Unlike Parliament, the Congress is able to initiate taxing and spending proposals, but the president may veto them. It is evident that each element of the congressional system of countervailance or 'checks and balances' operates independently, which is necessary if the separation of powers is to be effective. Parliamentary government functions quite differently. Power is made responsible through the twin devices of integrating the 'executive' into the 'legislature' and creating a collective executive each member of which is constitutionally responsible and individually accountable to his colleagues and to the House of Commons.

In the congressional system, cabinet secretaries and others of similar rank are creatures of the president. Their deputies are appointed to office and are intended to be partisan *vis-à-vis* the Congress, which holds them *politically* answerable for their respective roles in the president's administration.¹⁷ Ministers are quite different from cabinet secretaries. They are constitutionally responsible for the exercise of power, and they are elected representatives. Their deputies are non-partisan and they cannot formally share the personal responsibility of ministers. Cabinet secretaries could, however, take an important step towards the constitutional responsibility of ministers by being popularly elected and made responsible to the Congress. If under such conditions their deputies continued in a politically active role *vis-à-vis* the Congress, it would be evident that the cabinet secretary was not truly constitutionally responsible in that his inability to answer completely for his department undermined his responsibility to the Congress. In such circumstances Congress could either strip deputies of their political answerability, or else it could bring them into the Congress ensuring that the cabinet secretary and his deputy together would be constitutionally responsible and jointly answerable to the Congress in the sort of commission or board arrangement that was current in parliamentary government until it was found more effective to concentrate responsibility in a single individual personally answerable.

¹⁷ Although formally accountable only to the president, they appear freely before congressional committees to explain the *president's* policy and actions. To the extent that such appearances constitute *de facto* accountability to congressional committees, secretaries and deputy secretaries share accountability for actions they have taken on behalf of the president.

Such an arrangement would, of course, violate the essential principle of the separation of powers in congressional government, and takes no account of the president as the embodiment of the executive. It seeks to graft onto the congressional system the parliamentary notion of the responsibility of the executive to the legislature, which could not be set in place without fundamental change in the distribution of power and hence responsibility in that system. The reverse of the coin in parliamentary government would be formally to divide the constitutional responsibility of ministers. A very important consequence of such a development would be to politicize those with whom the responsibilities of ministers were shared, i.e. deputy ministers. Unless at the same time parliamentary government was replaced with institutions compatible with a congressional-style division of powers, which would require that ministers be stripped of their constitutional responsibility to the House and reduced to the subordinate state of their deputies, the only means of accommodating the politicization of deputies would be to bring them into the House formally placing the minister's responsibility in a commission consisting of the minister and his deputy. Without this, Parliament would no longer be able to hold those of its members forming the government responsible for the activities of the public service, which would be intolerable to Parliament and the negation of its historical struggle to make government constitutionally responsible.

Conclusion

Congressional government *works* more subtly than is indicated here. Nonetheless, the essential differences in foundation and approach to the use of power are stark and must be understood by those who think that an attractive aspect of a different system of government can be transplanted without disturbing the pattern of the constitution, risking destruction of the delicate balance of constitutional responsibility.¹⁸

¹⁸ For some interesting thoughts on the differences and similarities in the nature of the 'executive' in parliamentary and congressional systems, see Richard Neustadt, 'White House and Whitehall' in *The British Prime Minister* ed. by Anthony King, (London, 1969), pp. 131-147.

The Deputy Minister's Accountability

The deputy minister is appointed by the prime minister, in consultation with the minister whom he serves, and must observe centrally prescribed standards for the management of the resources at the disposal of his department. It is sensible, therefore, that the accountability of the deputy minister should rest on the roles and responsibilities that stem from his relationships with the minister, the prime minister, and the ministry as a whole.

The deputy's accountability cannot be exercised without reference to the responsibility of ministers to Parliament. Deputies act on behalf of their ministers. They are, therefore, accountable to ministers, although they may be required to answer *before* parliamentary committees for matters that do not overtly impinge on the responsibilities of ministers.

The triangular relationship between prime minister, minister, and deputy minister defies precise dissection. There is, of course, the theoretical possibility of conflict between the deputy's loyalty to the minister and the prime minister. In practice, however, this will not occur if the system's principle of countervailance is at work, with the needs of the collectivity emerging from and sharpening the exercise of the individual responsibilities of ministers.

good → The deputy's 'supreme loyalty is to his minister', who has within him the seeds of the individual and collective nature of the system.¹⁹ The prime minister orchestrates the individual responsibilities of his colleagues, drawing forth the harmony essential to stable government. As the Glassco Royal Commission observed in its report, the appointment of deputies by the prime minister 'provides a reminder to them of their need for a perspective encompassing the whole range of government' and 'emphasizes the collective interest of ministers, and the special interest of the prime minister in the effectiveness of management in the public service'.²⁰ Nonetheless, provided the equilibrium of the system is in order, the principal quality of the deputy is loyalty to his minister.²¹

¹⁹ See Bridges 'Ministers and the Permanent Departmental Head'.

²⁰ *Royal Commission on Government Organization* vol. i, p. 60

²¹ Jennings, *Cabinet Government*, p. 97. A former Secretary to the Cabinet has observed that it is the duty of a deputy minister to advise his minister and '... to try to keep him out of trouble. But once the minister decides upon a course of action or a new policy, it is the duty of the public servant to further it loyally, except in the rare case where it may be unlawful. When that happens and all else fails, the public servant has no choice but to resign.' See J.W. Pickersgill, 'Bureaucrats and Politicians' *Canadian Public Administration* vol. xv, no. 3, 1972.

Conflict between the deputy's loyalty to his minister and his responsibility to the prime minister will be symptomatic of a failure of the confederal principle discussed earlier. If it occurs, the clear line of responsibility passing between the minister and his deputy may be destroyed and in the extreme will only be restored through the resignation of one or other, in which event who goes will depend on the particular circumstances.

A deputy will go to the prime minister in two sorts of situations. First, there will be the rare case in which the deputy feels that the minister has instructed him to do something that is contrary to his conscience, or where in his opinion the minister is proposing to act dishonestly or in some other unacceptable manner that breaches the standard of ministerial conduct. In such cases the deputy must make use of his avenue to the prime minister. The second situation is one in which the deputy becomes involved in a dispute with his minister over some matter of policy or administration, or some centrally prescribed management ordinance that he thinks is contrary to his minister's interest. In such a case, a wise deputy will appeal to the prime minister only in the last resort, and it would be most extraordinary for disagreements of this nature to result in resignations. Such differences are, after all, exaggerated or uncontrolled examples of countervailance at work in the system, and usually the machinery for forging the collective from the individual wish will correct the situation.

Cases of dispute between ministers and deputies may be resolved with the help of the prime minister and his senior advisers, the secretaries to the cabinet. More generally, however, countervailance between ministers or between deputies is made a creative rather than a destructive force by their own desire for accommodation and by the synthesizing roles of the Privy Council Office and the Treasury Board Secretariat, which work to draw individual initiatives and proposals into the market place so that they may interact, gradually forming themselves into initiatives satisfactory to the collectivity.

The deputy is, therefore, principally concerned with the responsibility of his minister. He should be judged foremost for the way in which his activities on behalf of the minister contribute to the equilibrium of the system. If central agencies operate successfully, they will create the right circumstances for transforming individual initiatives into a collective undertaking. If they do not, due either to too much or too little activity, they destroy the

circumstances in which ministerial government operates successfully. This is why it is crucially important that central agencies and departments understand the nature of constitutional responsibility in our system of ministerial government and their respective roles within it. If central agencies can strike the right balance throughout the system, their activities will complement the policy initiatives and management functions of departments, ensuring that the requirements of the centre sharpen the individual responsibilities on which the system is based.

Conclusion

Because the deputy minister supports the individual responsibilities of his minister, and because he plays a special role in helping his minister to maintain the collective responsibility of the ministry, his accountability should reflect:

- i—his responsibilities to his minister for the authority that he exercises on behalf of the minister to develop policies and programs, to execute it in accordance with the purposes for which Parliament appropriates money, and to do so by managing and directing those portions of the public service located in the minister's department;
- ii—his support for the exercise of his minister's collective responsibility by ensuring (a) that his minister's policy positions on departmental and other governmental issues are adequately supported; (b) that at the direction of his minister he develops policies and programs that will complement the overall objectives of the ministry as subscribed to by his minister; and (c) that in fulfilling his special responsibility for the management of the department and its programs, he observes the standards and practices imposed on each minister and his deputy by all ministers;
- iii—his special responsibility to ensure that the centrally prescribed management practices of the ministry applicable across the government are observed in his department in order to ensure (a) that the ministry will be able to approach Parliament as a collectivity for supply; and (b) that management practices are such as to ensure the maintenance of Parliament's confidence in the ministry; and

iv—that he should (a) be consulted in the elaboration of those policies of the government in whose implementation he will be expected to play a key role; and (b) because he has a special responsibility for the management of the public service resources deployed in his department, he should contribute to the establishment of centrally prescribed management standards necessary to the maintenance of Parliament's confidence in the ministry.

VIII

THE PRINCIPLES OF ACCOUNTABILITY

Accountability in the system derives directly from the responsibility of ministers. Ministers answer before Parliament and are challenged to defend the way in which they or their officials have exercised the power that is made legitimate by their constitutional responsibility as ministers. Parliament expects and requires that ministers be responsible, and enjoys ready access to ministers for the purpose of holding them answerable. Deputy ministers derive almost all of their authority from ministers. They are loyal to their ministers and are required actively to support and participate in the policy and administrative decisions taken by ministers individually and collectively. Put simply, deputy ministers are responsible to ministers.¹

This paper has traced the line of authority flowing from the Crown and the way in which power has been harnessed to the requirements of a representative system of government. Henry Parris has summarized the history that has made the concentration of responsibility in the hands of ministers the bedrock of Parliamentary government.

¹ Mr. Pickersgill has noted '... while bureaucrats should not be partisan, they do not have the right to be neutral between government and opposition. Public servants owe loyal service to the government in office whether they like its politics or not. Governments are put in office by the electors, and public servants have no right to sabotage or even to obstruct the decision of the voters. For the best public servants it is not enough to avoid obstructing the political will of the minister and the government. The best of them will try to contribute to the limit of their abilities to the formulation, amelioration, and implementation of new policies or changes in policy of the government of the day, since the government, not the public service, is answerable to the legislature and the public'; 'Bureaucrats and Politicians', pp. 426-427. Lord Armstrong, when he was head of the British home civil service, echoed similar views on the link between loyalty and responsibility in testimony to a select committee of the House of Commons: 'The impartiality of the civil service lies in its loyal support to the particular party which happens to be in power and that impartiality does not extend to impartiality between the Government on the one hand and the Opposition on the other.' See Maurice Wright, 'The Professional Conduct of Civil Servants', *Public Administration* spring, 1973, pp. 1-15. On the desirability of permanent and relatively anonymous senior officials, see Sir William Armstrong, 'The Role and Character of the Civil Service' published for the British Academy, (Oxford, 1970), pp. 13-16.

If the advice of the Crown originated with a permanent official, what was the proper course for opponents of that policy to take? To attack the minister would miss the target. If, on the other hand, they attacked the official, they would not be able to get rid of him, because of his permanent status. The difficulty was eventually resolved by an extension of the doctrine of ministerial responsibility.

In extreme cases, ministers resigned while officials stayed on. Maitland pointed out that 'royal immunity is coupled with ministerial responsibility'. Lowell turned the coin over to read the inscription on the other side: 'The permanent official, like the King, can do no wrong.'²

But, of course, just as the Crown must act on 'advice', so officials must subordinate themselves to ministers, and these are the considerations that create and fasten on ministers their constitutional responsibility.

It is, however, a matter of observation that government is a large enterprise. It is not a modern phenomenon that ministers cannot know everything that is done under their authority; the phenomenon is merely more acute today than it was 200 years ago, and not *prima facie* proof of the irrelevance of ministerial responsibility. Ministers spend much of their time providing information to Parliament, indicating a need for the minister's ability to answer and provide information to be shared without, however, sharing his responsibility. Parliament has recognized this need, and, without prejudicing its right to hold the minister responsible, it has increasingly accepted that officials should answer for matters that at first glance at least are unlikely to involve the House's confidence in the minister. This development is best observed in the practices that have grown up in Parliament's standing committees.

The essential principles of accountability are, therefore, that power flows from the Crown and is exercised by ministers who are responsible *to* Parliament. Officials advise ministers and they are accountable *to* ministers. The accountability of ministers to Parliament may, however, be divided into those matters that directly involve or in the course of debate come to involve the House's confidence in ministers, and those which do not or are unlikely to involve that confidence. The distinction having been drawn, and bearing in mind the importance of ensuring that ministers can effectively hold officials accountable, it is noteworthy that current

² Parris, *Constitutional Bureaucracy* pp. 104-105.

practice indicates that parliamentary committees play (or have the potential to play) a significant role in holding officials accountable *before* them, thereby *assisting ministers* to ensure sound management of the public service and making more effective the *direct* and *formal* accountability of officials *to* ministers.

Parliamentary committees may play a role in the accountability of deputy ministers, but it is the responsibility of ministers to ensure that deputies, who are their agents, are accountable to ministers. When all is said and done, the fact is that in our system ministers are *elected to decide* whereas officials are *appointed to administer and advise*. The accountability of deputies should reflect harmoniously the relationships with prime minister, minister, and ministry that devolve upon deputies by virtue of their responsibilities to support the individual and collective responsibilities of ministers. ✓

Accountability depends upon systematic means of assessing performance. In this, a distinction should be drawn between the roles of deputies as policy advisers and as administrators. The assessment of the deputy's policy role is essentially a matter of subjective judgement and an appreciation of his success in fulfilling any previously stated specific policy goals. Assessment for administration is, however, more amenable to objective evaluation based on the deputy's success in the application of management standards and other relatively objective criteria. In this, deputies should be given an adequate voice in the establishment and operation of the centrally prescribed management practices and procedures, which govern the use of the resources that are essential to the fulfilment of the policy and program objectives of the government.

The deputy should understand (and wherever possible participate in determining) the criteria according to which he will be judged and held accountable. This is particularly true in the formulation and management of programs and the administration of his department. It is also important in the area of policy development and the setting of policy objectives, where the deputy must ensure that he has taken advantage of his opportunity to explain his views and set out any administrative or other constraints that may hinder the fulfilment of particular objectives. Deputies should not be held accountable on a piecemeal basis. Management and finance are integral to policy, and although the deputy's performance in these areas initially may be assessed

separately, conclusions and career decisions must be determined on an overall basis. The performance of deputies should be assessed as objectively as possible, and their accountability should depend on the judgement of those to whom they are responsible (the minister and prime minister) based on the best specific expert assessments that can be provided.³

Conclusion

Accountability that takes account of these considerations depends on an understanding by Parliament, ministers, the public service, and above all by deputies and central agencies of the complex role played by the deputy in reinforcing the constitutional responsibilities borne individually and collectively by ministers. The deputy's accountability, based on the constitutional responsibility of his minister, sharpened by the convention of collective responsibility, made more effective by his administrative answerability before Parliament, must be rendered to those from whom he holds his appointment, to whom he is responsible, and who will determine his future.

³ The means of assessing the performance of deputies is the subject of an accompanying paper, 'Senior Personnel in the Public Service'. (Submission 3).

SUBMISSION 2

RESPONSIBILITY IN THE
CONSTITUTION PART II:
NON-DEPARTMENTAL BODIES

SEPTEMBER 1978

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PART I: GENERAL INTRODUCTION¹

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1. This paper uses the term "non-departmental bodies" in lieu of the more frequently-used "Crown agencies". The latter term has caused some confusion with the term "agents of the Crown", which describes the legal position of many, though not all, non-departmental bodies.

In the United Kingdom those organizations that are referred to here as non-departmental bodies are known as "quasi-governmental" or "quasi-non-governmental" depending on their proximity to the public sector. As a group they are referred to in Whitehall jargon as "the fringe". Although a number of non-departmental bodies can be seen as operating on the fringe of the Government of Canada, many, such as the regulatory bodies and most Crown corporations, are, or at least intended to be, instrumental in the government's achievement of public policy objectives and are, therefore, closer to government policy implementation than the term "the fringe" might imply. See Desmond Keeling, "Quasi-Governmental Agencies, Beyond Ministerial Departments: Mapping the Administrative Terrain".

The term "non-departmental bodies", as used in this paper, does not cover those bodies that might be called "Parliamentary Organizations", such as the Office of the Auditor General of Canada, the Human Rights Commissioner, the Public Service Commission, the Commissioner of Official Languages, the Chief Electoral Officer and the Representation Commissioner. These organizations are agents or servants of Parliament for whom the schemes of ministerial responsibility and accountability discussed in this paper do not apply. Even though ministers may table the reports of these organizations before Parliament, they do not report to Parliament "through a minister" under the conventional meaning of that phrase and ministers are not responsible and accountable for their actions.

the origins and meanings of individual and collective ministerial responsibility before Parliament are set out and defined. The penultimate chapter of that Paper explained, as well, the role of deputy ministers of government departments in the context of individual and collective responsibility under the Canadian constitution. The systems of accountability set out in that Paper related to the operations of departments of government. Left outside the ambit of that Paper are the myriad of non-departmental forms of government organization established and maintained precisely because the standards of ministerial responsibility and accountability for the departmental form of administration were found to be unsuited to the administration of certain types of activities. When compared to departments, non-departmental bodies are, to use the words of J. E. Hodgetts, "structural heretics".¹ They are also heretics from the even more fundamental point of view of ministerial responsibility accountability for their actions before Parliament.

The history of the non-departmental form of government administration under the British constitution stretches back to the reign of Queen Elizabeth I, where the Monarch placed certain functions out of the direct reach of her Ministry. Since that time, governments have used the non-departmental form to relieve - or not add to - the burdens of responsibility placed on ministers as well as resorting to its use for the administration

1. J. E. Hodgetts, The Canadian Public Service, University of Toronto Press, 1973, Chapter 7.

of activities which were deemed to be best managed at arms' length from ministerial and parliamentary scrutiny and control.¹

In the Canadian context non-departmental bodies have a history as old as the nation itself. In fact, non-departmental bodies in the form of corporations, sprang up before Confederation to build canals and administer and develop ports and harbours. Shortly after Confederation the Government established the North West Mounted Police Force (later the RCMP) as an entity separate from any existing department with the Comptroller given the rank of a deputy head. In the intervening period successive governments have created a vast number of non-departmental bodies so that today there are substantially more of them than there are departments, and they administer a wide variety of government and quasi-government activities.

A basic sub-classification of such organizations can be made instantly. Some non-departmental organizations have corporate form and are either wholly or partially-owned and controlled by the Government of Canada. This broad grouping includes Crown corporations, corporations wholly-owned or controlled by the Government of Canada, mixed enterprises - and stretching the definition - consortium arrangements.²

1. See Submission 1 Chapter 1.

2. These terms are defined in Part III ("Public Enterprises").

Another group of non-departmental bodies operates in a quasi-judicial fashion or have quasi-judicial powers and obligations. Regulatory commissions such as the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian Transport Commission (CTC) and the National Energy Board (NEB); administrative tribunals such as the Tariff Board and Anti-Dumping Tribunal; and appeal tribunals such as the Tax Review Board and Pension Review Board fall into this category. The basic distinction between these three types of organizations is that the regulatory commissions dispense "privileges" between competing interests in the form of the ability of companies or individuals to exploit natural monopolies or scarce national resources. The privileges are dispensed in the form of licences and permits and are then subject to continuous on-going regulation. The dispensation and the continuous regulation which follow are usually the subject of a process of public hearings within a policy framework established by the constituent act and regulations thereunder. As well as performing the above function, traditionally, regulatory commissions often advise the government on regulatory policy as well.

Administrative tribunals, on the other hand, deal not in the realm of privileges, but in the realm of rights of individuals, groups or companies pursuant to an Act of Parliament. Such tribunals make judgements of fact on individual cases within the framework of the governing statute and, to make their determinations, hold hearings that are conducted in a quasi-judicial fashion. Appeal tribunals are constituted to hear and

determine appeals from administration action by officials or decisions of administrative bodies and accordingly, in the same way as administrative tribunals, deal in the realm of rights as opposed to privileges.

A third group of non-departmental bodies performs advisory functions to the government and the public in general. In fact, over the years the federal government, frequently at the suggestion of private groups, has established a host of bodies whose principal or sole role is the provision of expert and objective advice to individual ministers and the government on policy or on ways and means of achieving public policy objectives. The list of such bodies would include the Economic Council of Canada, the Environment Advisory Council, the Law Reform Commission, the National Council of Welfare, the Standards Council of Canada and the Canadian Fisheries Advisory Council.

A fourth group of non-departmental bodies includes those organizations that issue grants to corporations, associations, groups or individuals to undertake studies and research in particular areas. The Canada Council and the Medical Research Council are two prominent granting bodies now in operation. Under the *Government Organization (Scientific Activities) Act*, approved by Parliament in June, 1977, two new granting organizations have been established: the Social Sciences and Humanities Research Council and the Natural Sciences and Engineering Research Council.

A final group may be classed as marketing boards. Because they operate in areas of concurrent federal-provincial jurisdiction, often under federal-provincial agreements, such organizations are usually joint federal-provincial undertakings established for the purpose of buying and selling produce or establishing quota to ensure adequate return to producers on their labour and investment. Organizations such as the Canadian Egg Marketing Agency and the Turkey Marketing Board, the Fisheries Prices Support Board and the Freshwater Fish Marketing Corporation would fall into this category.

Unfortunately, for purposes of analysis, few non-departmental bodies fall neatly and completely into any one of the above categorizations. A large number of agencies, boards and commissions exist that defy precise classification. Further many, if not most, non-departmental bodies perform a number of roles that further obscure effective classification under any one of the above-mentioned categories. For example, quasi-judicial regulatory commissions often have significant advisory responsibilities. In fact, one agency that is usually grouped with regulatory commissions, the Foreign Investment Review Agency, because of its duties and responsibilities is really an advisory body. Further, several advisory bodies have corporate form and are listed in the Schedules to the *Financial Administration Act* as Crown corporations. In the majority of cases there are valid historical reasons to account for such apparent anomalies and the search for common threads on which to

base an effective analysis should not obscure or ignore those apparent anomalies. However, since some sort of broad classification is required for purposes of general discussion, the analyses which follow in this paper group non-departmental bodies according to their primary or major function, or the distinguishing characteristics of their organization.¹

Similarly, there exists an almost bewildering number of variations in the structure and powers of non-departmental bodies not only from group to group, but amongst those that have been placed, for purposes of this paper, in one group. These variations can be attributed to three major factors. First of all, non-departmental bodies have arisen due to a particular constellation of events and circumstances that has come together at one point in time and each particular body has been organized to respond to it. Consequently, any body's structure and organization must be considered in light of the circumstances that prevailed at the time the body was being created. When viewed in this context the apparent lack of consistency in organization, structures and powers of non-departmental bodies is not necessarily a weakness, but illustrates that the government of the time was merely trying to adapt particular non-departmental bodies to the requirements and circumstances of the day.

1. This paper covers two broad groups, namely: (Part II) Regulatory Commissions, Administrative Tribunals and Appeal Tribunals; (Part III) Public Enterprises, including Crown corporations, mixed and joint enterprises.

A second reason for the variations in structure and powers is that the creation of non-departmental bodies has, in some cases, been considered in the abstract without comparison to similar, existing organizations or with reference to any model or norm.

Finally, until relatively recently, successive governments and Parliaments, in their principal concern with mandates, powers and objectives, did not always apply the same attention to structural issues, aside from the composition and method of appointing the managing boards.

Having said all that, it is possible to state that, at least in the majority of cases, the non-departmental organization form was devised to achieve, or has achieved, one or both of the following major objectives:

Separation from Politics

Of paramount significance to a study of ministerial accountability for non-departmental bodies is the fact that many, if not most, were established to achieve a degree of independence and separation from government control and direction and parliamentary scrutiny much greater than that allowed for departments of government.¹ The non-departmental organization can,

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1. It would be an error to assume that all non-departmental bodies have been established to achieve independence. Several non-departmental bodies were created as part of a department or have since been integrated into a department. A number of corporations were created simply to establish a legal entity that could acquire, hold and dispose of property and sue and be sued in its own name. Many non-departmental bodies, in spite of their non-departmental constitution, are treated no differently from departments.

though need not necessarily, separate the administration of an activity from the more or less continuous ministerial direction and control and day-to-day parliamentary scrutiny that applies to departments, thereby removing the administration of certain activities from constant political control and direction: to take administration "out of politics". The desire to take a function out of politics may mean either that an activity is so intractable and controversial that politicians feel that the administration should be the concern of an objective, expert group of individuals subject to the day-to-day control of neither a minister, the ministry nor Parliament, or that the information and expertise necessary to the administration requires expert, objective individuals. Administration in this fashion not only allows the politician to avoid controversy, but also lends legitimacy to administration by vesting responsibility in expert, independent individuals.

The separation from government interference has been held to be especially necessary when governments undertake economic regulation. According to this line of reasoning economic regulation, inasmuch as it involves either public interference in the exercise of what are private proprietary rights (as in the transportation and energy sectors), or else competing applications for control of parts of the public domain (such as radio and television licences) must be undertaken as impartially as possible to ensure that the results are fair and just and free from partisan interference. It was, in fact, the function of economic regulation of the railroads by the federal government that led to the creation of the

first Canadian non-departmental, quasi-judicial regulatory body (the Board of Railway Commissioners) which has been the model for the creation of many subsequent regulatory commissions. Similarly, advice on policy and the exploration of policy alternatives has often had more public credibility when the function is carried out by a non-departmental body rather than a department under the continuous control and direction of a minister.

In the same fashion, the federal government very soon after Confederation chose to vest the day-to-day functions of law enforcement and the prevention of crime with a de-politicized police force operating within a non-departmental structure. That structure serves to separate the police force (namely the Royal Canadian Mounted Police) from political direction with respect to operations and the results of day-to-day police operations are assessed and acted upon by an independent judiciary. The Commissioner of the RCMP, rather than a minister of the Crown, is vested by Parliament with "the control and management of the force, and all matters connected therewith", subject to direction on policy from a minister.¹ Similarly, under the *National Defence Act* the Chief of the Defence Staff is responsible for "the control and administration of the Canadian Forces" subject to the regulations under the Act and under the direction of the Minister of National Defence.²

1. *Royal Canadian Mounted Police Act*, RSC, 1970, R-9, s.5.

2. *National Defence Act*, (RSC, 1970, N-4), Part II s. 18.

Finally, governments have on occasion found it easier to recruit businessmen, scientists and other specialists from the private sector to government service in the form of a non-departmental rather than departmental body. In such cases - the best examples of which are non-departmental bodies with corporate form - the bodies are structured to suit the particular requirements imposed on them and, amongst other things are not subject to day-to-day ministerial interference and therefore provide a familiar environment for the recruit.

Separation from Bureaucratic Requirements and Procedures

Another factor that has led to the creation of many non-departmental bodies is the desire to separate the administration of a function from the bureaucratic personnel and budgetary constraints and procedures that apply to departments. For example, when in the pursuit of public policy objectives the government establishes or assumes ownership of a business enterprise, it is often desirable that the enterprise be run on the basis of the best business practices and principles used in the private sector, rather than those of the public sector. Similarly, scientific and other organizations requiring special skills not common to the public service generally, have been allowed special privileges and a degree of flexibility not available to departments in the recruitment, training and remuneration

of their employees.¹

In addition to the two major objectives outlined above, the non-departmental form of organization has, in many instances, satisfied other objectives.

For example, non-departmental bodies often have been created with a single objective, or at least markedly fewer objectives, than the multi-role government department. The more limited objectives allow the government to create an organization structure uniquely adapted to their achievement.

Again, diseconomies of scale inevitably arise when departments of government become too large to manage a wide range of functions in an effective fashion. Rather than establishing a new department which may soon fall victim to the same malaise, it may be possible to "hive-off" certain functions to non-departmental bodies, for which close continued parliamentary and ministerial involvement is unnecessary. "Hiving-off" in such instances should relieve ministers of a portion of the substantial responsibilities imposed on them.

1. The majority of scientific organizations such as the National Research Council, the Medical Research Council, Science Council of Canada and the Atomic Energy Control Board are 'separate employers' under the *Public Service Staff Relations Act* meaning that the body itself, rather than the Treasury Board, is the employer in the name of Her Majesty and the body is not subject to Treasury Board approval for remuneration paid to officials or the appointment power of the Public Service Commission with respect to staff. Similarly, the vast majority of corporations listed in Schedule C to the *Financial Administration Act* and all corporations listed in Schedule D are subject to Part V of the *Canada Labour Code* like similar private sector corporations and unlike departments and some non-departmental bodies that fall under the *Public Service Staff Relations Act*.

Finally, the non-departmental form has been especially useful to the government in the area of mixed enterprises and marketing boards as a device whereby the federal government may administer a function in partnership with provincial governments or governments in the United States or the private sector. In the same fashion, because non-departmental bodies are often headed by a board or commission, a broad range of interests and expertise can be brought to bear on the management of certain activities which require a broad spectrum of views or a "multi-disciplinary approach" to management. In addition, because they are separated from the bureaucracy with single-purpose or limited mandates, such bodies are more accessible to the public and, therefore, allow for more effective public participation in the policy-making and decision-making process.

Appointment and Dismissal of Heads of Non-Departmental Bodies

Each statute that establishes a non-departmental body will also create a managing entity (a board of directors, commission, board of trustees) to be formally responsible for undertaking certain functions entrusted to it by Parliament and to control and supervise operations. As has already been noted, while responsibility before Parliament for a department resides in one person (the minister), responsibility for a non-departmental body is usually, though not always, through a group of individuals in the form of a board, commission or other managing entity.

As in the case with deputy ministers the heads of the majority of non-departmental bodies are appointed by the Governor in Council. From time to time the statute will require that the Governor in Council appoint on the recommendation of the appropriate minister. In only a few instances will a minister alone have the authority to appoint members to the managing entity of a non-departmental body.

Unless the statute dictates otherwise, it is the Prime Minister who recommends to the Governor in Council a candidate for appointment as head or full-time member of a non-departmental body. When a minister other than the Prime Minister makes a recommendation to the Governor in Council, (e. g. to fill a part-time position), the appointment is usually the subject of consultation with other ministers concerned. Even when a minister himself may appoint without reference to the Governor in Council, the minister will usually discuss the candidates with the Prime Minister and his other colleagues.¹

1. The convention of consulting the Prime Minister or having the Prime Minister make the formal recommendation to the Governor in Council stems from Order in Council PC 3374 (October 25, 1935) which establishes certain of the Prime Minister's prerogatives including appointments. For a detailed discussion of the evolution of this order-in-council see Submissions 1 and 3.

The constituent acts of non-departmental bodies will also establish the terms and conditions of appointment of those individuals chosen by the Governor in Council or minister to supervise the management of the body, or otherwise perform the functions vested in it by Parliament. In a few cases, incumbents must fill certain statutory conditions. For example, one of the persons appointed to be Vice President of the Canadian Transport Commission, and the members of several administrative tribunals and appeal tribunals must be barristers or advocates of at least ten years experience. The boards of directors of the CBC and the National Arts Centre and the Commission of the National Capital Commission must have representation from specified areas. Several constituent acts also require that public servants serve on the management entity (usually the boards of Crown corporations) as *ex officio* members.

Like deputies, many appointees to non-departmental bodies hold office "during pleasure". However, to reinforce their independence a number of non-departmental bodies are headed by individuals who not only serve for varying periods in the range of three to 10 years specified by statute, but also serve "during good behaviour" and may be removed by the Governor in Council only after an address to the Senate and House of Commons. Not all appointees to a particular non-departmental body enjoy the same terms and conditions of appointment. For example,

the directors of several Crown corporations may be removed only "for cause", while the chairman and president hold office "during pleasure".¹

There are four basic classes of conditions of appointment any combination of which might apply to a specific incumbent: serving "during pleasure" or serving "during good behaviour"; removed only "for cause" or removed only upon address to the Senate and House of Commons. While the last condition is self-explanatory the first three are not.

A "during pleasure"² appointment springs from the traditional Crown prerogative to appoint and dismiss at will. In theory, an appointee serving during the pleasure of the Governor in Council may have his appointment revoked at any time and for any reason. However, with the development of administrative law and judicial review by the courts of administrative action by governments, the Governor in Council may be required to show cause for the dismissal. Cause in this regard could be related to the conduct of the official in the context of his appointment or otherwise.

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1. See, for example the *Air Canada Act*, 1977 (Assented to February 2, 1978) ss 7(4) and ss 7(6).
 2. In those cases where the constituent act is silent, under section 22 of the *Interpretation Act*, (RSC, 1970, I - 23) the incumbent serves during pleasure unless the appointing order in council indicates otherwise.

The Governor in Council has less discretion in revoking an appointment which is served "during good behaviour". The Governor in Council clearly must show cause for dismissal and unlike a "during pleasure" appointment, the cause must be related to the conduct of the incumbent's duties and responsibilities. In other words, dismissal may occur only when the incumbent has done something which clearly impedes his ability to perform the functions of the position to which he has been appointed. For example, a conflict of interest on the part of a quasi-judicial official would probably be cause for dismissal; a personal transgression not related to the position held would probably not be.

An appointee who may be removed only "for cause" may be removed on largely the same grounds as an appointee who served "during good behaviour".

Therefore, in theory at least, an appointment "during pleasure" means that the incumbent can be removed at any time at the unfettered discretion of the Governor in Council. An appointment during "good behaviour" and removable "only for cause" indicates that the Governor in Council must show a valid reason for dismissal. For obvious reasons, an incumbent who may be dismissed only after an address to the Senate and House of Commons is the most secure of all, for it would be only in exceptional circumstances that a government would follow such a course.

In practice, however, there is an almost bewildering combination of conditions of appointment found in the

constituent acts of non-departmental bodies. The "during pleasure" condition is frequently juxtaposed with a condition that the appointee may be removed only "for cause": a stipulation that would appear to be redundant. In one or two exceptional instances appointees serve "during pleasure" for a fixed term, but may be removed by the Governor in Council "for cause" only upon address of both the Senate and House of Commons. These two conditions, at least in theory, would be mutually exclusive.

Similarly an appointee may serve "during good behaviour" alone, or "during good behaviour" but may be removed "for cause". Another combination found from time to time in the statutes is an appointee who serves "during good behaviour" but may be removed by the Governor in Council upon address of the Senate and House of Commons.

However, any conditions which may be attached to an appointment which add to the security of the incumbent, or any appointment served at other than at the pleasure of the Governor in Council are intended to underscore independence and are required by many of the constituent acts of non-departmental bodies.

Ministerial Responsibility for Non-Departmental Bodies

1) The Minister as "Appropriate Minister"

Ministers fulfill a number of roles, or "wear a number of hats", as it were, for non-departmental bodies.

In the first instance, with only a very few exceptions, for each non-departmental body the Governor in Council has designated a particular minister as the "appropriate minister" for purposes of the *Financial Administration Act*. This means that the minister has, either individually or with other ministers or the Governor in Council, certain responsibilities, duties and powers under that *Act* with respect to the financial management, control and accountability of the bodies for which he is the appropriate minister.

2) The Minister as "Responsible Minister"

When designated by Parliament or the Governor in Council as the appropriate minister for purposes of the *Financial Administration Act*, the minister is by implication also designated as the minister responsible for answering for or on behalf of a non-departmental body to Parliament and for generally supervising its administration. In the case of a few non-departmental bodies a minister has not been designated as appropriate minister for purposes of the *Financial Administration Act*. No non-departmental body has been established or exists, however, which does not have a minister who reports on its behalf, or is responsible for it before Parliament either pursuant to a statute or an order in council passed under statutory authority.

As a matter of practice, rather than law, the duties of the individual designated as the responsible minister have progressively increased and developed as both Parliament and successive governments have come to recognize the individual and collective responsibility of

ministers in establishing the framework of public policy within which non-departmental bodies must operate. Ministers, as appropriate ministers under the *Financial Administration Act*, and the ministry have always had at their command financial and other controls, such as the approval of budgets, to effect government policy through non-departmental bodies. However, recently, Parliament has in certain instances vested in the ministry additional powers to effect and communicate policy such as directives for Crown corporations¹ and the authority to approve, rescind or vary the decisions, orders or regulations of many regulatory commissions and administrative tribunals.² The responsibility of ministers for the enunciation of policy and its communication to non-departmental bodies - and the responsibility before Parliament for the performance of these functions - has evolved as a matter of usage over the past two to three decades. The responsibility and accountability is largely exercised through the individual responsible ministers.

3) The Minister as "Trustee Shareholder"

With respect to non-departmental bodies with corporate form, such as Crown corporations, other corporations wholly-owned by the Government of Canada and mixed enterprises, the minister is often, but need not always be, the "trustee shareholder"; the true or ultimate shareholder being the Crown. The prerogatives

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1. The first directives for Crown corporations appeared in special acts in the 1950's. The most recent special acts incorporating Crown corporations (the *Petro Canada Act*, 1975 and the *Air Canada Act*, 1978) have vested with the Governor in Council powers of direction. At present the Governor in Council or responsible minister is authorized to issue "directions" to eleven Crown corporations.
 2. See Part II, Chapter II ("Functional Analysis of Regulatory Commissions, Administrative Tribunals and Appeal Tribunals") for a detailed discussion.

and responsibilities that devolve to the minister as a consequence of being a trustee shareholder vary widely between two groups of corporations: those established by a special act of Parliament and those incorporated under companies legislation such as the *Canada Business Corporations Act*. In any event, the prerogatives and responsibilities of the minister as trustee shareholder are not synonymous with the prerogatives and responsibilities of the shareholder of a company in the private sector.¹

4) The Basic Concept of Ministerial Responsibility for Non-Departmental Bodies

Having established the three basic types of relationships which ministers have with non-departmental bodies, this Introduction now turns to a general examination of ministerial responsibility for non-departmental bodies. The basic point to be established is that the degree and type of ministerial responsibility for non-departmental bodies is substantially different from that for departments of government.

The fundamental distinction between departments and non-departmental bodies is that in the case of the latter, Parliament has, through the constituent act

1. See Part III, Chapter 1 ("Crown Corporations") for a detailed discussion.

(where one exists)¹ delegated directly to the non-departmental body (i.e. the board of directors, commission, board of trustees or other management body established by the constituent act) certain duties, powers and functions. In addition, the management bodies exercise a range of residuary powers related to the operations and mandate of the non-departmental body. These residuary powers are those that have not been explicitly vested with another authority and have, accordingly, been implicitly vested with the body itself. As ministers are responsible before Parliament for the exercise of their powers, duties and functions, non-departmental bodies are directly accountable to Parliament in the same fashion; the only difference being that in response to parliamentary questions, non-departmental bodies may only respond through a minister. The minister, however, answers on behalf of the body and takes no responsibility himself.

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1. In several cases, including the *Atomic Energy Control Act* and *Department of Regional Economic Expansion Act*, a minister is authorized by Parliament to incorporate companies for certain stated purposes. Incorporation then takes place under companies legislation such as the *Canada Business Corporations Act*. After incorporation the minister is the shareholder and his rights and duties *qua* shareholder are defined by the companies legislation under which the corporation was established. Using the wording of the *Canada Business Corporations Act* (section 97) the directors, in turn, are responsible for managing "the business and affairs of the corporation". Although not set out explicitly in legislation, Parliament by authorizing a minister to incorporate companies in this fashion has implicitly recognized the shareholder-board relationship *vis-à-vis* the minister and the directors. Consequently, Parliament has implicitly vested the boards in these instances with the responsibility for management under a minister's supervision.

This is not to say that non-departmental bodies are accountable only to Parliament and are not subject to control and direction by or accountable to ministers. Neither should it indicate that ministers are not responsible in certain respects for non-departmental bodies.

As has already been mentioned, the statutes governing non-departmental bodies will, in the majority of cases, vest with a minister or Governor in Council sufficient powers, duties and functions whereby they may control the general policies and objectives of the non-departmental body as well as control their commitments and expenditures which impact upon the Consolidated Revenue Fund and the fiscal framework. Parliament insists that where any organization (departmental or non-departmental) relies on appropriations or loans from the Consolidated Revenue Fund, the responsible minister must sponsor the necessary request for funds through Estimates and the Crown must underwrite those requests in the *Appropriations Act*. Similarly the responsible minister signs and submits requests to the Treasury Board for spending requirements for departmental and non-departmental bodies, prior to Estimates.

In order to establish clearly the distinction in ministerial responsibility between departments and non-departmental bodies, compare and contrast, for example, the constituent act of the Department of Agriculture (a department) with that of Air Canada (a non-departmental body). The *Department of Agriculture Act*¹ clearly vests with the Minister of Agriculture the powers and duties of control and direction over the department. The Minister

1. *Department of Agriculture Act*, RSC, 1970, A-10.

"has the management and direction over the department".¹ and his duties and powers extend to the "execution of all laws enacted by the Parliament of Canada and of orders of the Governor in Council"² relating to the subjects enumerated in the *Act*. The *Act* then goes on to enumerate specific subjects which are under "the control and direction"³ of the Minister. At no point does the *Act* vest any powers, duties or functions with any person, office or body other than the Minister of Agriculture.

Under the *Air Canada Act*,⁴ the Board of Directors is vested by Parliament with the management of the Corporation and Parliament has given to the Board sufficient powers, duties and functions or left to the Board sufficient residuary powers, duties and functions to undertake the responsibility of management independent of government intervention. The statute does set out the capacities and activities of Air Canada which act as a framework within which the Board must operate. Further, several powers of general direction and control have explicitly been vested with the ministry. For example, aside from the Governor in Council's power to appoint directors, the chairman and chief-executive officer and to approve corporate by-laws, he is also authorized to issue directions "of a general nature" to the Corporation, thereby making it clear that the ministry may effect the policy, general objectives and long-term plans of Air Canada, but may not intervene in day-to-day administration. Secondly, under Part VIII of the *Financial Administration Act*,⁵

1. *Ibid*, s.s.2(2)

2. *Ibid*, s.s.4

3. *Ibid*, s.s.5(1)

4. *Air Canada Act*, 1977, Op cit.

5. *Financial Administration Act*, RSC, 1970, F-10.

the Corporation must submit annual capital budgets to the Governor in Council for approval. In order to allow the appropriate minister to monitor the general performance of the Crown corporation and take corrective action if necessary, the auditor reports annually to the minister and the minister, in addition, may require such other reports as he deems necessary.

The powers delegated to the minister or ministry may be general or specific and vary significantly from one non-departmental body to another. In the case of the National Harbours Board, the Governor in Council is empowered to make by-laws for the "direction, conduct and government of the Board and its employees" and also for "the administration and management of the several harbours works and property under (the Board's) jurisdiction."¹ More specific ministerial or Governor in Council powers are found in the constituent acts of the Atomic Energy Control Board (requiring Governor in Council approval of regulations and authorizing the Minister to issue binding special or general directions to the Board)² and the *National Energy Board Act*, (which requires ministerial direction prior to the commencement of certain studies and investigations as well as ministerial authority to publish the findings and recommendations that result and Governor in Council approval of the majority of Board decisions.)³ In the case of the National Film Board, the constituent act requires that the minister "shall control and direct the operations" of the Board and further that "the powers of the Board are subject to the direction and control of the Minister".⁴

1. *National Harbours Board Act*, RSC, 1970, N-8, s.s.14(1).

2. *Atomic Energy Control Act*, RSC, 1970, A-19, s.9 and s.7.

3. *National Energy Board Act*, RSC, 1970, N-6, s.s.22(2), s.23.

4. *National Film Board Act*, RSC, 1970, N-7, s.3 and s.10.

Responsibility for non-departmental bodies consequently has been intentionally and clearly dispersed. Where Parliament has vested with the minister or ministry powers, duties and functions with respect to a non-departmental body, the minister or ministry is responsible for their exercise and for errors that occur as a result. Where Parliament has delegated powers, duties and functions to the non-departmental body, the body itself is accountable directly to Parliament for their exercise. As was pointed out in the previous section, to ensure the inviolability of the heads of the non-departmental bodies from interference from the ministry in the exercise of these functions, Parliament has often accorded them a security of tenure not made available to deputy ministers.

In a few instances, the constituent act of a non-departmental body requires it to undertake such duties, powers and functions which have been vested with the minister by Parliament as the minister may from time to time require. If the minister directs the body to perform on his behalf powers, duties and functions delegated to him by Parliament, the minister remains responsible for the conduct of those powers, duties and functions in the same way as if he had delegated them to the deputy minister of his department. His responsibility persists even though he may not have at his command the powers necessary to control and direct the actual administration of that which he has delegated. To have otherwise would mean that a minister could escape responsibility for the conduct of departmental activities simply by having them undertaken by a non-departmental body - assuming that statutory authority existed to allow the transfer.

A minister is unable to escape responsibility for continuous managerial errors perpetrated by a non-departmental body by maintaining a deliberate ignorance of the organization's affairs and general managerial performance; Parliament has shown itself to be most unsympathetic to pleas by a minister that he "did not know what was going on and could not be expected to do so". Consequently, Parliament appears to expect ministers to take reasonable measures to ensure that they are kept generally informed of the activities of the non-departmental bodies within their jurisdiction and in a position to be warned of recurring or forthcoming problems of significance. The normal mechanism chosen by ministers is to maintain contact and consult with the chief-executive officer or management entity of the non-departmental body or have his deputy minister do the same on his behalf. In the case of Crown corporations and other corporate entities, the minister is encouraged to maintain contact with the chairman of the board as the representative of the board.

In this regard a minister is placed on a very fine line between a reasonable protection of his responsibilities on one hand and, on the other, the responsibilities and prerogatives of the management of the organization and it is almost inevitable that from time to time a board of directors or commission will complain that a minister has stepped over the line and is undercutting the board's responsibilities.

Non-Departmental Bodies and Parliament

The distribution of powers, duties and functions between the minister and the Governor in Council and a non-departmental body dictate the way in which ministers respond to Parliamentary questions. If a question involves the exercise or non-exercise of powers, duties and functions which have been delegated by Parliament to the minister, the minister responds by taking direct responsibility. If, on the other hand, a question involves the exercise or non-exercise of powers, duties and functions delegated directly to the body, the minister does not take responsibility but answers "on behalf of" the body.

Every non-departmental body must submit an annual report to the designated minister who then tables the report in Parliament.¹ In many instances the minister is also authorized to require from the body or its auditor such other reports as he might from time to time require. These latter reports may or may not be tabled in Parliament. These reporting requirements not only reflect Parliament's need to be assured that the non-departmental body is fulfilling its mandate, but also imply a general supervisory responsibility for the minister and underlines the potentiality that he may be required by Parliament to take corrective action in the case of errors.

1. Most bodies submit individual reports to the minister which are then tabled in Parliament. The annual reports of several bodies (e.g. the National Parole Board, the Textile and Clothing Board, Director of Soldier Settlement and Veterans' Land Act) are, however, incorporated in the department report.

Each non-departmental body may, and frequently will, be called before a Committee of Parliament to account for its actions. The most frequent forum is the Standing Committee on Miscellaneous Estimates, where representatives of the non-departmental bodies appear to defend annual requests for funds. Representatives will frequently appear before other Committees from time to time, and those meetings frequently become accountability sessions where the activities of the body are fully scrutinized and questioned. If the Committee is unsatisfied with the performance of the body it may comment to Parliament on its concerns and make recommendations. Those recommendations usually have considerable impact on the non-departmental body and the ministry.

Deputy Ministers and Non-Departmental Bodies

In only a few instances has Parliament vested directly with a deputy minister specific powers, duties and functions with respect to non-departmental bodies. An exception exists under the *Anti-Dumping Act* where the Deputy Minister of Revenue (Customs and Excise) initiates investigations by the Anti-Dumping Tribunal and the Tribunal reports to him on its findings.¹

Under the *Interpretation Act*² a minister may delegate to his deputy the exercise of his powers, duties and functions (though not the responsibility before Parliament) vested in him by Parliament with respect to non-departmental bodies. However, such a

1. *Anti-Dumping Act*, RSC, 1970, A-15, s.13.

2. *Interpretation Act*, RSC, 1970, 1-23, s.s. 23(2).

delegation has seldom been formally made and both ministers and non-departmental bodies usually stoutly defend the direct link to the minister and resist any reporting relationship of significance to the department.

In the main, however, the deputy minister's role *vis-à-vis* non-departmental bodies is exercised through his responsibilities as the principal source of advice to the minister on policy and the coordinator of policy development and implementation. As such, it is the deputy's responsibility to advise the minister on policy to be implemented by non-departmental bodies and on their general performance in implementation. In so doing, the deputy must consult with the heads of non-departmental bodies and keep himself generally informed of their activities on behalf of his minister.

Deputy Ministers frequently serve on the boards of Crown corporations, government-owned corporations and mixed enterprises either *ex officio* or pursuant to an appointing order-in-council.¹ In one or two instances, (e.g. the Canada Development Corporation), deputy ministers sit with the board but have no vote. From time to time the deputy minister may also serve as the chairman, chief-executive officer, or both.

1. In only a few instances do public servants sit on marketing boards or administrative tribunals. Current practice is that deputy ministers and public servants generally do not sit on the boards of regulatory commissions or appeal tribunals.

As directors, deputy ministers fulfil any of the following roles: In cases where the performance of the corporation is the cause of concern to the minister because of poor past performance the deputy minister may sit as the minister's personal representative to advise on and ensure that effective corrective action is underway. In cases where the corporation is a vital instrument in the achievement of government policy and objectives, the deputy minister of the policy department may be a director to ensure that the corporation is fully and continuously aware of government policy. In those cases where several deputies sit on a board, the deputies may legitimately represent the interest of their respective ministers. Finally, in several instances deputy ministers sit on boards because of their special expertise which is of value to the particular functions and mandate of the corporation.

In serving on boards deputy ministers have to be very careful not to short-circuit the direct link that must be maintained between the chairman or chief-executive officer of the corporation and the minister. Further, deputy ministers must also act in the best interests of the corporation when serving as a director and should respect the corporation's operational autonomy, otherwise the corporation's accountability before Parliament with respect to the use of corporate powers, duties and functions may be obscured.

PART II

REGULATORY COMMISSIONS, ADMINISTRATIVE TRIBUNALS AND APPEAL TRIBUNALS

INTRODUCTION

As indicated in the General Introduction to this Paper, there exists a large number of non-departmental bodies at the federal level that perform quasi-judicial functions and have quasi-judicial powers and duties. The common characteristic of these non-departmental bodies is that they all reach determinations, usually after a process of public hearings. To ensure that the bodies are equipped to act effectively in this regard, most are vested by Parliament either with court of record status or the powers of Commissioners under Part I of the *Inquiries Act*.

Regulatory Commissions, administrative tribunals and appeal tribunals are each subsets of a larger group of non-departmental bodies known as quasi-judicial administrative agencies, which include any

"government authority, other than a court and other than a legislative body, which affects the rights and privileges of private

parties through either adjudication, rule making, investigating, prosecuting, negotiating, settling or informally acting."¹

For purposes of this paper the bodies falling into this broad category have been grouped as regulatory commissions,² administrative tribunals³ and appeal tribunals⁴. As has been set out in the General Introduction, the basic distinction amongst these groups is that administrative tribunals, either by rule or decision, determine private rights and obligations; appeal tribunals also determine rights and obligations, but on appeal from decisions or administrative actions by officials or administrative tribunals. Regulatory commissions often arbitrate amongst competing claims and interests to determine the allocation of privileges dispensed by the state and the conditions and limitations that are to be placed on the exercise or use of those privileges.

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1. H.C. Davis. Administrative Law Text, p. 1
 2. The National Energy Board (NEB), the Canadian Transport Commission (CTC), the Canadian Radio-television and Telecommunications Commission (CRTC), the Atomic Energy Control Board (AECB).
 3. There is a large number of bodies that would fall into this category including the Anti-Dumping Tribunal, the Tariff Board, the Canada Labour Relations Board, the Canada Pensions Commission, the Restrictive Trade Practices Commission, the International Joint Commission, the National Parole Board, the Public Service Staff Relations Board, the Cultural Property Export Review Board, the National Farm Products Marketing Council.
 4. For example, the Pension Review Board, the Pension Appeals Board, the Tax Review Board, the Patent Appeal Board, the Immigration Appeal Board, the War Veterans Allowance Board.

The word "determine" is used quite loosely in the above conceptual definition. Determine in this context means that the body reaches a conclusion, but in many cases, especially with regard to regulatory commissions and administrative tribunals, that determination may be overthrown, vetoed or varied by the government, and all subsequent action may be undertaken only by the government.

The purpose of Part II is to study this quasi-judicial, non-departmental form of government administration, to establish its origins, the reasons for the creation of such organizations, their structure, powers, duties and responsibilities and the special status which Parliament and the ministry have given them, which protects them from intervention by both the government and Parliament throughout the adjudicative process. Having done that, it will then be possible to move on to a discussion of the respective responsibilities of the ministry and the quasi-judicial tribunals and their accountability to Parliament.

Because of their special and significant role in the development and implementation of policy, considerable attention in Part II is placed on the regulatory commissions and the special issues of independence, control and accountability they engender. The following chapter, therefore, relates a brief history of the evolution of the Canadian federal regulatory commission.

CHAPTER IEVOLUTION OF THE NON-DEPARTMENTAL REGULATORY COMMISSION

Regulation by the federal government has gone through a number of permutations both in the type and extent of regulation applied to an activity and the form of the regulatory body. By narrating the history of regulation in three economic sectors - transportation, energy and broadcasting - the following section will also illustrate the evolution of federal regulatory activity and the evolution of the forms of organization as well as the powers, duties and functions of the regulators.

1. REGULATION OF TRANSPORTATIONa) The Railroads

Prior to and for some time after Confederation, governments were primarily interested in the expansion of railways in Canada and gave secondary attention to their regulation and control. During this period it was thought that any problems which arose with respect to rates or service levels could be resolved through competitive forces. However, this is not to say that the railroads were able to escape all regulation at this stage. From time to time the charter of a railroad company would contain maxima for rates. In one or two instances the charters required Governor in Council approval for rates set by the directors of a railway company. In several

instances, furthermore, a tax was imposed on dividends above a certain level paid by railway companies. Under the *Railway Clauses Consolidation Act* (1851)¹ the tolls of all railway companies falling under the authority of the *Act* were subject to approval by the Governor in Council and, in addition, the *Act* required that there be no discrimination or preferences in tolls.²

Also in 1851 the Legislative Assembly of Canada approved legislation which authorized construction of the Inter-Colonial Railroad.³ Through that legislation was established a Board of Railway Commissioners⁴ consisting of the Receiver General, the Inspector General, the Commissioner and Assistant Commissioner of Public Works and the Provincial Postmaster General with the Secretary of the Commissioners of Public Works as the Secretary. The Board was actually an advisory body, generally supervising the construction of the railroad and making recommendations to the Governor in Council. In 1857, the Legislative Assembly of the Province of Canada authorized the Board to supervise, in addition the general safety of railroad construction and operation assisted by inspectors appointed by the Governor in Council.⁵

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1. "An Act to Consolidate and regulate the General Clauses relating to Railways", (30 August, 1851), 14-15 Victoria, Cap LI, (later the *Railways Act, Consolidated Statutes of Canada*, 1859, Cap LXVI).
 2. *Ibid*, section XIV.
 3. "An Act to make provision for the construction of a Main Trunk Line of Railway throughout the whole length of this Province". (30 August, 1851), 14-15 Victoria, Cap LXXIII.
 4. *Ibid*, section XVII.
 5. "An Act for Better Prevention of Accidents on Railways" (May 27, 1857), 20 Victoria Fifth Parliament, Chap. XII.

After Confederation, in 1888 to be exact, the Dominion government established a Railway Committee of the Privy Council under the authority of the *Railway Act* of that year.¹ Pursuant to the new *Act* the Committee consisted of the Minister of Railways and Canals (chairman), the Minister of Justice and two other ministers appointed by the Governor in Council.² The Committee regulated the speed of trains, the "use of steam whistles" and matters relating generally to the safety of rail transportation. The Committee also had the power "to enquire into, hear and determine any application, complaint or dispute..."³ regarding rights of way, construction of branch lines, fencing, accidents and "Tolls and rates for the transportation of passengers and freight"⁴.

The Railway Committee continued operation until 1903. During that time, significant problems arose in the railway transportation sector. First of all it became apparent that competition in itself was not going to solve vexing rate problems. It came to be realized that the huge initial capital investment required for construction of the lines made railroad companies in most areas natural economic monopolies. Claims of discriminatory rate practices by the railroads were heard from many regions of the country to the discomfiture of politicians who were directly responsible

1. *The Railway Act*, (May 22nd, 1888), 51 Victoria, 1888, Vols. 1-2, Chap. 29.

2. *Ibid*, section 8.

3. *Ibid*, section 11.

4. *Ibid*, s.s. 11(k)

for regulation. Secondly, the Committee very quickly proved to have several fatal flaws. Its members were overworked, it lacked technical knowledge and expertise, it was political and, therefore, its decisions were sometimes suspect, its membership lacked permanence and it could not move around the country from time to time to study particular issues and hear specific complaints.¹ Another more effective instrument apparently was required.

At first some thought was given to delegating the function of railway regulation to the courts. It was soon realized, however, that the traditional judicial system was neither equipped for, nor capable of, performing such a function. The courts could not initiate proceedings, only dealt with individual matters rather than issues affecting a whole industry and could not conduct independent investigations. The judicial system was appropriate for individual, adversarial proceedings, but such a system could not adequately accommodate the regulatory function where the regulatory body must be able to initiate hearings, undertake investigations not associated with a particular case, issue regulations having the force of law and hear proceedings in an environment more informal and flexible than that common to courts of law. Precedent, the foundation of the judicial system would have to take second place to the public interest and the evolution of public policy. The very nature of

1. See the Report on railroads to the government by Prof. S. J. McLean, Sessional Paper No. 20a, 1-2 Edward VII (1902).

regulation of the railways meant that Parliament could not specify hard and fast rules for the courts to apply to their regulatory proceedings. The courts would, therefore, have had to have assumed a role in the definition of regulatory policy with little in the way of legislative direction, not to mention little in the way of expert or technical knowledge for their own part. The assumption by the courts of such a role would have marked a revolutionary departure from their traditional and accepted role.

By the late 1800's claims of discriminatory rate practices by the railroads and the apparent inability of the government to do anything about them had served to largely discredit the Railway Committee of the Privy Council as an effective regulatory body and prompted the government to search for a more flexible, effective and de-politicized regulatory organization. S. J. McLean, retained by the government to study the issue made two reports (1899 and 1902) and concluded, first of all, that greater regulation of the railroads was necessary, for, in his opinion, a railroad

"...is not only a body organized for gain, but also a corporation occupying a quasi-public position and performing public function."¹

1. *Ibid*, p.5

Secondly, McLean concluded that the appropriate regulation of the railways

"...can be met in one of two ways,
State ownership or Commission regulation.
There is no middle course".¹

This latter conclusion was reached after a thorough study of the British and U. S. experience in regulating the railroads, especially the new Inter-State Commerce Commission (ICC), in the U.S.² Flowing from McLean's observations, the regulatory powers of the Railway Committee were transferred in 1904 to a new organization: the Board of Railway Commissioners for Canada. The "main and capital features"³ of the *Railway Act* which established the Board were the Board's powers *vis-à-vis* the regulation of tolls. (It was hoped that those powers would end any preferential or discriminatory rate tactics by the railroads) and the fact that the Board was composed

1. *Ibid.*

2. The ICC model has been rejected in 1888 in favour of the Committee of the Privy Council because it was thought that the ICC was too new and innovative as a model on which to base Canadian railroad regulation.

3. Hon. A. G. Blair, Minister of Railways and Canals, Debates of the House of Commons, 1902, Vol. 1, April 9, 1902, p. 2433.

4. Even with the existence of a regulatory body, governments did not abandon the belief (or hope) that competition would eventually solve the problems of rate scheduling and service. For example, both the federal government (the Laurier Government) and the Government of British Columbia sponsored a railroad (the Canadian Northern) to compete with the CPR. See Herschel Hardin, A Nation Unaware: The Canadian Economic Culture, J. J. Douglas Ltd., Vancouver 1974, p.p. 177-78.

of individuals other than politicians. For the first time, railroad regulation was out of the unfettered control and supervision of elected officials.

As originally constituted the Board was a court of record with a seal to be judicially noticed. The independence of the Board was reinforced through provisions in the *Act* that the three Commissioners appointed by the Governor in Council, including the Chairman, served "during good behaviour" for terms of ten years and were removable only "for cause". In 1908, due to a rapid increase in the mileage of rail in operation or under construction, the membership was increased to a total of six including the chief commissioner and assistant chief commissioner. Indicative of the judicial nature of the Board, the statute required that these latter individuals be judges of a superior court of Canada or the provinces, and barristers or advocates of at least 10 years standing. In 1948 the chief commissioner became a justice of the Exchequer Court assigned to the Board for a term of 10 years. This situation continued until 1957. The Board had all of the powers of a superior court in the enforcement of orders, hearing of witnesses, production and inspection of documents and attendance of witnesses.

In spite of the extent to which Parliament had gone to establish the security of tenure of Board members and the quasi-judicial attributes of the Board - which were to become a standard feature of many of the future non-departmental regulatory commissions - the Board was far from being independent of government direction and control. The *Railway Act* of 1903 gave to the Governor in Council, on petition or on his own motion, the power to "vary, change or rescind any order, decision, rule or regulation" of the Board and also empowered the Governor in Council to direct the Board as to those orders, decisions, rules and regulations. The directions were binding on the Board and all parties.¹ During debate of the *Electricity and Fuel Exportation Act* in 1906 the then Minister of Justice described the Board of Railway Commissioners as "...but a branch of the government.." with responsibility simply to make determinations of fact within the policy framework and the criteria established in the legislation.²

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1. *The Railway Act* (assented to October 24, 1903) Statutes of Canada, Ninth Parliament, 3 Edward VII, Vols. 1-11, 1903, Chapter 58.
 2. Hon. A. B. Aylesworth, Debates of the House of Commons, 1906-1907, Vol. III, p. 4646.

There was considerable debate in Parliament at the time as to whether or not "political intervention" to this degree, specifically the provision of appeals to the Governor in Council, was appropriate for a body with quasi-judicial attributes. In later years, appeals to the Governor in Council were justified as necessary primarily to ensure the concurrence of regulatory decisions with public policy. However, in 1903 the appeal process was proposed in large part to pre-empt litigation through the courts. According to the government, the Interstate Commerce Commission in the United States had been subjected to an enormous amount of litigation that had "nullified" its powers.¹

The Board of Railway Commissioners continued to operate with minor changes in its powers, duties and functions, until the creation of the Board of Transport Commissioners in 1938.²

b) Air Transportation

During and prior to the first World War the development of aeronautics was limited almost entirely to military and naval applications. Commercial aeronautics was prohibited altogether. However, at the end of the War it became obvious that air transport would soon burst out of its infancy into commercial applications. To establish control over the development of the industry Parliament approved the *Air Board Act* (1919)³. The *Act*

1. *Ibid*, p. 4618-9.

2. See part (d) below.

3. *Air Board Act*, (assented to June 6, 1919), Statutes of Canada, Second Session, Thirteenth Parliament, 9-10 George V, Vol. I-II 1919, Chapter 11.

established a Board of five to seven members appointed by the Governor in Council who served "during pleasure" for terms of up to three years. A minister of the federal government was to serve as Chairman and the membership was to consist of one representative from the Department of Militia and Defence and another from the Department of Naval Service. The Board was, therefore, "politicized" in its original composition.

The purposes of the Board were administrative, advisory and regulatory; all major regulatory functions being subject to Governor in Council approval. The Board was to "study the development of aeronautics"¹ and "construct and maintain government aerodromes and air stations."² It was also given the responsibility to prescribe and regulate the use of aerial routes and regulate the licensing of pilots, registration of aircraft and air stations and establish conditions for the use of air transport carriers.

In 1938 pursuant to the newly amended *Transport Act*,³ the functions of the Air Board along with those of the Board of Railway Commissioners were brought together under the new Board of Transport Commissioners. One of the reasons for this transfer was that ministers found it both politically and practically difficult to be involved directly in commercial air regulation.

1. *Ibid*, s.s. 3(b)

2. *Ibid*, s.s. 3(c)

3. *Transport Act*, (assented to July 1, 1938), Statutes of Canada, 2 George VI, Parts 1-11, 1938), Chapter 53.

After six years, however, regulation of air transport was again completely singled out in a separate board, the Air Transport Board. The Board of Transport Commissioners, due in part to its quasi-judicial proceedings and in part to its basic railway orientation and experience, had not regulated the burgeoning air transport industry to the satisfaction of the government.¹ The new Board was given the responsibility for helping the Government implement its air policy as enunciated by Prime Minister King in 1943. That policy, incidentally, called for greater government control of air development and opposed competition between air services.

Established under the *Aeronautics Act*,² the Air Transport Board consisted of a Chairman and two members, appointed by the Governor in Council, who served "during good behaviour". For all intents and purposes the Board was an advisory body, studying at the direction of the Minister of Transport and recommending to the government, ways and means of advancing civil aviation.³ All regulations made by the Board required approval by the Governor in Council.

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1. For a discussion of the reasons underlying the Government's dissatisfaction with the Board see David Corbett, *Politics and the Airlines*, (London 1965: Allen & Unwin Ltd.), pp. 161-165.
 2. *Aeronautics Act* (assented to August 15, 1944) Statutes of Canada, 8-9 George VI, Part 1-11, 1944-45, Chapter 28.
 3. *Ibid*, s. 10.

The approval of the Minister of Transport was required prior to the issue, by the Board, of any licence, and the Governor in Council had to determine that the licence was in the public interest. Further, a certificate had to be issued by the Minister of Transport to an operator before the Board could hear his application for a licence and any cancellation of a licence could be appealed to the Minister of Transport. Only in making its own rules of procedure could the Board act without some form of government direction and approval. The Government had, accordingly, reversed completely its earlier decision (1938) to depoliticize air transport regulation.

In 1945 the *Aeronautics Act* was amended giving the Board the powers of a court. The Board was also authorized to hear and inquire into a complaint by an interested party against an air carrier for violation of a regulation or order. As if to offset these new powers, the amendments expanded the ability of interested parties to appeal to the Minister where the Board not only cancelled a license, but also where it had suspended, amended, refused to issue or attached conditions to a licence to which an applicant objected.

The Board had no power to initiate inquiries into violations of its regulations, orders or licences. This situation was corrected by a further amendment in 1950 when the Board was given its own investigative powers.¹

1. Corbett, *op cit*, p.p. 275-276.

From 1951 to 1954 the advisory role of the Board in policy-making was accentuated. During that period the Civil Aviation Branch of the Department of Transport was placed under the Chairman of the Air Transport Board who reported, on its behalf, to his Minister. Further, a rail and aviation research unit was administered jointly by the Board of Transport Commissioners and the Air Transport Board until the unit was transferred to the Department of Transport in 1954.¹

In 1967, with the advent of the new *National Transportation Act*, the regulatory and advisory activities of the Air Transport Board were subsumed into the newly established Canadian Transport Commission.²

c) Marine Transportation

During World War I the Canadian shipbuilding industry was revived due to heavy orders for the building of merchant ships for the Imperial Munitions Board. Towards the end of the War the Canadian government decided to construct cargo ships for its own use in the war effort and after the war established Canadian Government Merchant Marine Limited to manage and operate them in peace-time.

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1. John R. Baldwin, "The Evolution of Transportation Policy in Canada". A Seminar Paper Presented to the Canadian Transport Commission, (Ottawa, January, 1977), p. 44.
 2. See part (d) below

In the interval between the wars the Canadian shipbuilding industry and merchant marine fell on hard times again and, as a result, the merchant marine was woefully ill-prepared when the Second World War began in 1939. After the war, however, Canada was in possession of the world's fourth largest merchant marine fleet and it was the government's intention to maintain an adequate merchant navy as a significant element in the defence of the nation and to assist in Canada's continued economic development.

Coinciding with these developments in the merchant marine and shipbuilding industries was the 1938 opening of the enlarged Welland Canal, one of the first major breaks in the monopoly position of the railways in transportation. Consequently, along with rail and air transportation, the regulation of inland marine transport had been brought under the regulatory jurisdiction of the new Board of Transport Commissioners (1938) to avoid "destructive competition" amongst the three modes of transport.

However, there continued to be several regulatory agents for merchant shipping, including the Minister of Transport under the *Shipping Act* of 1934, the Minister of Industry, Trade and Commerce, whose department administered various steamship subventions, and the Minister of National Revenue who was responsible for licencing ships under Part XIII of the *Canada Shipping Act*. During the Second World War the number of maritime regulatory bodies multiplied further. As a consequence, a special committee had recommended to the government in 1943 that all government machinery dealing with merchant

shipping should be more effectively coordinated.¹

Conceivably the government could have turned to the Board of Transport Commissioners (which had been established in 1938) to regulate the full gamut of maritime transport, but the government, it seems was more interested in undertaking the regulatory function itself. What was needed, in the opinion of the government, was not a quasi-judicial regulatory body, but an expert, technical organization to undertake research, compile data and advise the government on marine policy.

In 1947 pursuant to the *Canadian Maritime Commission Act*,² the Canadian Maritime Commission was established consisting of three members, including the Chairman, appointed by the Governor in Council and serving "during good behaviour". Like the Atomic Energy Control Board that was established the following year, the Commission was constituted as a corporation, but deemed to be a department of government "responsible to and subject to the direction of the Minister", with the Chairman as the deputy head.³ The Commission was, in almost all respects, purely advisory with the power to obtain all the information and data it required in the performance of that role. It was charged with responsibility for presenting to the government a complete picture of both

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1. C. D. Howe (Minister of Munitions and Supply), Debates of the House of Commons, 1947, Vol. V, p.4197.
 2. *Canadian Maritime Commission Act*, (assented to July 17, 1947), Statutes of Canada, 11 George VI, Vol. 1, 1947, Chapter 52.
 3. *Ibid*, s.s. 4(3).

shipping requirements and development possibilities together with a survey of shipbuilding capacity. The Commission also administered the steamship subventions formerly administered by the Department of Industry, Trade and Commerce.

d) Board of Transport Commissioners (1938-1967)

In 1936 the functions exercised by the Department of Railways and Canals were amalgamated with those of the Department of Marine and the Civil Aviation Branch of the Department of National Defence within the new Department of Transport so that all matters related to transportation, aside from several regulatory activities, were brought under the control and supervision of one minister. The amalgamation was prompted by increased competition between modes of transport and the consequent need for coordination between carriers in the pursuit of efficiency in the transport field. For largely the same reasons, the government established in 1938 the Board of Transport Commissioners as the single regulatory and advisory authority for railways (formerly the mandate of the Board of Railway Commissioners), commercial air transportation (formerly the responsibility of the Air Board) and inland shipping. The amalgamation of transport regulation in this fashion was apparently modelled on experience in the United States and the Interstate Commerce Commission.

The new *Transport Act*, which established the Board of Transport Commissioners, simply transferred the powers of the old Board of Railway Commissioners

to the new Board. There was not even a change in personnel. The new Board was to handle the regulation of air and marine transport in the same procedural way as the old Board had handled the regulation of the Railroads under the *Railways Act*. However, Section 5 of the new *Act* did set out fairly detailed considerations the new Board would have to bear in mind when granting a licence to a carrier. The major effect of these provisions was to convert the Board of Transport Commissioners into a truly intermodal regulator with a requirement, not simply to guard against the excesses of the transportation companies (which had been the prime responsibility of the Board of Railway Commissioners), but also to coordinate and harmonize the operations of rail, ship and air carriers to avoid "destructive competition". Of potentially greater significance, the new Board was authorized to administer powers which for the first time would control entry into the transportation sector by operators. Provisions with respect to Governor in Council control were unchanged from the *Railway Act* and these provisions were basically the same as those first established in 1903.

In spite of the change in name and the expansion of jurisdiction, the Board of Transport Commissioners seemed unable to shake off a preoccupation with railways that had been the legitimate mandate of the old Board of Railway Commissioners. Further, the quasi-judicial procedures of the Board proved ill-suited to the conduct of advisory activities which the government

demanding for the air and maritime transport fields. As a result, and as had already been mentioned, the Board's air transport mandate was hived-off to the Air Transport Board in 1944. Further, advice related to shipbuilding and the merchant marine originated from the Canadian Maritime Commission after 1947.

e) The Canadian Transport Commission (CTC) (1967-present)

Intermodal competition had continued to develop, after the establishment of the Board of Transport Commissioners in 1938. Intrusion into the railway monopoly continued to occur from inland shipping, air carriage, truck and automobile transportation. The rail strike of 1950, during which other modes of transport were largely able to fill demand, illustrated that the railroads no longer enjoyed a complete monopoly.

Because of the development of intermodal competition, regulation by separate bodies of segments of the transportation industry was no longer appropriate. The government once again came to the view that the regulatory functions exercised by several organizations should be brought together under a single regulatory authority divorced from any one mode, so that intermodal impacts and alternatives could be assessed in the achievement of maximum transport efficiency. Accordingly, the regulatory mandates of the Board of Transport Commissioners, Air Transport Board and Maritime Commission were consolidated under one federal regulatory authority; the Canadian Transport Commission (CTC).

The *National Transportation Act*¹ which set up the CTC, enunciated in broad terms a "National Transportation Policy"² to be administered by the CTC, embodying the principles of free intermodal competition, efficiency, and commercial viability for the transportation carriers. In addition to railway, air and water transport, the *Act* brought under the CTC's jurisdiction commodity pipelines and commercial inter-provincial motor vehicle transportation,³ although jurisdiction over this latter area has never been implemented.

The CTC, following in the tradition of its predecessors (the Board of Railway Commissioners and Board of Transport Commissioners), is a court of record with a seal that is judicially recognized. In order to handle increased functions the CTC's membership was expanded by the *National Transportation Act* from that of the Board of Transport Commissioners to a maximum of 17 members all appointed by the Governor in Council, serving a term of up to ten years and removable only "for cause".

In a sense the modal approach to transportation regulation persists, albeit under the single regulatory umbrella of the CTC. Under the *National Transportation Act* five intermodal committees of the CTC were established: railway transport, air transport, water transport, motor vehicle transport and a commodity pipeline transport committee.⁴ Each committee is headed by a chairman,

1. *The National Transportation Act* (1966-67), RSC 1970, N-17.

2. *Ibid*, s.3

3. *Ibid*, s.s. 4(d) and s.s. 4(e) respectively.

4. *Ibid*, s.s. 24(1).

who is the chief-executive officer of the committee, and a minimum of two other members. Each committee has the power, within the rules and regulations of the CTC, to exercise all the powers, orders and directions of the CTC. To enforce intermodal co-ordination the *Act* stipulated that any operator may appeal a decision of a committee on the grounds that the decision discriminates against him as a transportation operator in another mode or is, in some other fashion, unfair to him. In such cases the CTC will review the decision and may confirm, rescind, change, alter or vary the decision of the committee or rehear the matter.

In 1968, pursuant to section 24(1)(f) of the *National Transportation Act*, the Commission established an International Transport Policy Committee as well as in 1970 an additional Committee to review decisions. In response to growing activity in telephone and telegraph rate regulation, a Telecommunications Committee was established in 1968, pursuant to sections 320-321 of the *Railway Act*. Although telecommunications is not a mode of transportation *per se*, historically it was the railway companies who were engaged in telecommunications operations (i.e. telegraphs). Consequently, telecommunications regulation was traditionally undertaken along with regulation of the railways. However, the situation changed in the late 1960's and early 1970's and with promulgation of the *Canadian Radio-television and Telecommunications Act* in 1975¹ the regulation of telecommunications became the responsibility of the CRTC.

1. *Canadian Radio-television and Telecommunications Act* (assented to June 19, 1975), Vol. 1, No. 9 Canada Gazette, Part III, Chapter 49, see p. 29 below.

2. REGULATION OF ENERGY

In the early 1900's the federal government was faced with a tremendous growth in hydro-electric power production, particularly from the plants at Niagara Falls in Ontario. At the same time there was concern expressed from several quarters that Canadian hydro-electric producers were exporting electric power to the United States without fully satisfying the domestic market. According to one Member of Parliament at the time, Canadian power was being used to fuel the factories and light the homes and farms of New York State, facilitating industrial development there while Canadian homes, farms and factories were not obtaining full benefit from Canadian resources.

In 1906 the Government introduced a measure known as the Electricity and Fluid Exportation Bill which, once approved by Parliament, was to establish federal regulatory control over the production and export of power and other sources of energy. Although the principal focus of the Bill was the regulation of electrical power, federal regulatory authority was also established over the export of petroleum, natural gas, water "or other fluid whether liquid or gaseous capable of being exported by pipelines or other contrivances."¹

1. *Electricity and Fluid Exportation Act*, (assented to April 27, 1907), 6-7 Edward VII, Vols. I-II, Chapter 16, s.s. 2(a).

The Bill was approved by Parliament April 27, 1907 and established that the export of power or fluid required a licence from the Governor in Council. Licences would be granted subject to regulations made by the Governor in Council and any licence could also be revoked by the Governor in Council at any time "upon such notice as the Governor in Council deems reasonable."¹ Any licence would describe the quantity of energy or fluid to be exported "at prices and in accordance with conditions, rules and regulations from the Governor in Council."² Licences from the Governor in Council were also required for the construction and location of wire and pipelines for the export of power and the Governor in Council was authorized as well to impose duties on such exports. Once in force, the Government used this power to ensure that domestic demand was satisfied by imposing prohibitive duties on exports of power where there was not a surplus.

During debate of the Bill there was considerable discussion as to the appropriate authority to exercise the discretionary powers listed therein. When first introduced the Bill vested authority in an individual minister of the Crown on the grounds that authority and therefore, accountability before Parliament should be localized in one publicly-accountable official rather than being diffused throughout the government. An individual minister was soon replaced by the Governor in

1. *Ibid*, s.s. 6(2).

2. *Ibid*, s. 5.

Council in the wording of the Bill. In the words of the minister sponsoring the Bill, the Governor in Council, represented by the Ministry which possessed the confidence of the House, "would seem to be the only tribunal...for the administration of this measure, instead of assigning (the administration) to the discretion of any particular member of the government."¹ From time to time during the debate on the new measure it was proposed that the administration be transferred to the relatively new Board of Railway Commissioners. Such proposals were rejected by the Government on the grounds that the Board was already overworked. Although the Government, at several points during discussion of the measure, argued that the Governor in Council was the only appropriate regulatory body in this instance, from a reading of the Debates one senses a certain ambivalence on behalf of the Government. From the debates it appears as if the Government had settled on the Governor in Council as the best available alternative, but was still slightly apprehensive. In spite of this apprehension, the Government firmly rejected opposition proposals to establish a new board or commission.²

With only marginal changes, the *Electricity and Fluid Exportation Act* remained in force until 1955 when it was repealed with passage of the *Exportation of Power and Fluids and Importation of Gas Act*. This latter statute remained in force until it was repealed by passage of the *National Energy Board Act* in 1959.

1. Hon. A. B. Aylesworth, *op cit*.

2. *Ibid*, p. 2282.

By the end of 1949 there were in existence only three interprovincial or international pipelines for the carriage of oil. However, with discoveries of new and large oil deposits in Alberta in the late 1940's Alberta's production had risen to about 100,000 barrels a day, only 60,000 of which were required for use in the three western provinces.¹ Consequently, for the first time there was enough surplus oil to make international and interprovincial sale feasible and profitable and a number of private companies were seeking authority to construct new interprovincial lines. Further, the Leduc oil discoveries in 1947 indicated that the same potential existed for natural gas, even if reserves could not be immediately proven, and there was a great deal of pressure from central Canada to move that gas east as quickly as possible to satisfy growing energy requirements.

Companies wishing to incorporate, for the purposes of constructing a pipeline, usually sought parliamentary authority to do so.² A Bill introduced

1. From figures provided by the National Energy Board.

2. Parliamentary incorporation was not mandatory prior to 1949 or under the *Pipelines Act* (1949). However, since the companies usually required expropriation powers parliamentary incorporation and the ability to expropriate was usually sought. In 1953 the *Pipelines Act* was amended to require that no company other than one incorporated by a special act of the Parliament of Canada could construct or operate interprovincial or international pipelines.

in the Senate in 1948 to incorporate Western Pipe Lines had received considerable debate and was subsequently withdrawn. That debate did, however, indicate a requirement for some general regulatory authority over the new and expanding field of pipeline construction and operation. Consequently, in the following Session, the Government introduced the Pipelines Bill, which was approved by Parliament in 1949.¹ Based on sections 91 and 92 of the *British North American Act* its purpose was to establish federal regulatory jurisdiction over interprovincial and international oil and gas pipelines. Licences from the Governor in Council were still required under the *Electricity and Fluid Exportation Act* for the exportation of oil and gas and the construction of pipelines for that purpose.

The Board of Transport Commissioners was given the authority to administer the *Pipeline Act* (1949) under the powers and duties conferred on the Board by the *Railway Act*. In brief, a company wishing to construct and operate a pipeline was required to file a plan with the Board, which if the Board agreed, would grant leave to construct the line. The Board was chosen as the administrator of the *Pipelines Act* on the grounds that it was better to have a quasi-judicial board in control rather than placing the control "directly in the hands of a department of government".²

Like the *Electricity and Fluids Exportation Act*, the *Pipelines Act* remained in force with minor amendments, until it was replaced by the *National Energy Board Act* in 1959.

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1. *The Pipelines Act* (assented to April 30, 1949), 13 George VI, 1949, Chapter 20.
 2. Mr. Green, Debates of the House of Commons, 1949, Vol III, p. 2513.

During the early 1950's applicants continued to come before Parliament for authority to incorporate companies to build and operate pipelines. Debate on such bills was usually protracted and often subject to filibuster. Usually attempts were made, and were sometimes successful, to have riders attached to the incorporating statute permitting the company to export gas and oil only in excess of domestic demand, or to construct the pipelines completely within Canadian territory. Such a procedure was seen by the government-of-the-day as a most unsatisfactory way to control pipeline construction and operation. The debates were also a prelude to the great pipeline debate of 1956, involving a Bill seeking approval for the government to assist in the financing of Trans-Canada Pipelines Limited to construct a gas pipeline from Alberta to Ontario. That debate played a significant part in bringing down the government in the general election of 1957.

On coming to power in 1957 the new government established a Royal Commission on Energy. The Commission's formal purpose was to assist the government in establishing a national energy policy, but it was clearly understood that the Commission was also to inquire into the financial transactions of some of the officers of Trans-Canada Pipelines Limited and to ascertain as to whether they had made, what might be termed, excessive personal profits as a result of their participation in the Company.¹

1. William Kilbourn, Pipeline: Trans-Canada and the Great Debate A History of Business and Politics, Clarke, Irwin & Company Ltd., (Toronto, Vancouver, 1970), p. 157.

One of the specific issues to which the Commission was to direct its attention was the extent of authority that might be conferred on a National Energy Board (NEB) to assist in the administration of an energy policy "together with the character of administration and procedure that might be established for such a Board."¹

Pursuant to subsection 92(10)(c) of the *British North America Act* and an important Supreme Court Decision in 1954, federal jurisdiction over the construction and operation of interprovincial and international pipelines and the export and import of oil and gas was clearly established. However, the provinces continued to exert a strong proprietary interest over oil and gas resources and the use to which they were put. The industry, as might be expected, was concerned about the possible impact on its operations of increased federal regulation.

Consequently, although the federal regulatory authority in this field was clear as a legal fact, as a practical matter, provincial and industry sensitivities had to be considered. It was in large part for this reason that the federal government was inclined towards the establishment of a semi-autonomous, non-departmental regulatory commission, rather than a department of the federal government as the regulatory body.

1. Order in Council PC 1957-1386, para. (c).

The Royal Commission made its first report in October 1958 and recommended legislation to provide for effective control over the export from and import into Canada of "all energy and sources of energy"¹ and the movement across provincial boundaries of the same. The Commission also recommended the creation of a National Energy Board as a permanent board² to study and recommend policies to the government "designed to assure the people of Canada the best use of energy and sources of energy in Canada."³ The Board would be authorized to issue certificates of public convenience and necessity for both the construction of interprovincial and international pipelines and issue licences for the export of gas and power and the import of gas and the construction of international power lines. The Board, in the Commission's view, would be independent "and not responsible to or subject to the direction of any specific minister."⁴ The major thrust of the Commission's recommendations was, however, to establish a source of technical expertise and policy advice for the government on energy matters and energy policy, there being at that time no department or other branch of the government performing such a function.

1. First Report of the Royal Commission on Energy, October 1958, p.x. para. 13.

2. Probably as a result of the proclivity of previous governments to establish such commissions with corporate form (e.g. Maritime Commission, Atomic Energy Control Board), the Royal Commission decided to recommend that the NEB not have corporate form indicating that corporate form provided no necessary function for such a body.

3. The Royal Commission Report, *op cit*, para. 14

4. *Ibid*, p. xiii, para. 27.

It was the Commission's view that the National Energy Board should not exercise sole jurisdiction in the field. It recommended that the Board of Transport Commissioners continue to exercise jurisdiction under the *Pipelines Act* respecting construction, design and tolls related to oil and gas pipelines and pipeline companies. However, the Board of Transport Commissioners would consider a pipeline application only after the applicant had received a certificate of public convenience from the proposed National Energy Board.

In presenting the National Energy Board Bill the Government rejected the shared jurisdiction approach recommended by the Royal Commission. In effect the Bill combined the regulatory authority of the *Pipeline Act* (administered by the Board of Transport Commissioners) with that under the *Exportation of Power and Fluids and Importation of Gas Act* (administered by the Governor in Council) of the new National Energy Board. Both previous acts were repealed upon passage of the *National Energy Board Act*. In its constitution and powers the new Board looked very much like the old Air Transport Board (ATB) that was established in 1944 and later subsumed into the CTC, with one major difference: the ATB was in all respects an advisory board to the government on decisions while only positive decisions of the NEB may be confirmed or rejected by the Government. Negative decisions of the NEB, pursuant to the *Act*, are not subject to any governmental review.

Following the recommendation of the Royal Commission on Energy, the NEB was authorized to conduct extensive research and advisory activities. Those research and advisory functions could be undertaken either at the

instigation of the responsible minister, or under the Board's general powers pursuant to subsection 22(1), which authorized the Board "to study and keep under review" a wide range of energy-related issues. Reports from studies which began at the Minister's initiative could not be published without his approval; the Board could, however, publish the results of studies which it itself had initiated under subsection 22(1). In its advisory capacity members of the Board were authorized to exercise the powers of Commissioners under Part I of the *Inquiries Act*.

The NEB replaced the Board of Transport Commissioners in the regulation of the construction and operation of oil and gas pipelines. Certificates of public convenience issued by the Board in this instance were subject to the approval of the Governor in Council as were all regulations governing their issue, on the grounds that:

"...new major pipeline projects appear likely to raise questions of national policy so important that the decisions must be reviewed in this way."¹

The Board also assumed the responsibilities previously exercised solely by the Governor in Council

1. *Ibid*, p. 3925.

with respect to international power lines, the export of electrical power and import and export permits. Pursuant to the regulations issued under the *Act* the approval of oil exports in excess of one year and gas import and export permits, their cancellation and suspension requires approval by the Governor in Council. The Board also regulated the tolls charged by oil and gas pipeline companies.

The Board's regulations are subject to Governor in Council approval. Accordingly, the Board cannot exercise any of its major responsibilities aside from the actual conduct of hearings without some form of Governor in Council approval. Although this fact was criticized by the opposition parties, the Government defended the relationship on two grounds; the first being to ensure that the Board's actions were consistent with government policy. The second reason was enunciated by the then Minister of Industry, Trade and Commerce (Mr. Gordon Churchill):

"We are setting up a body which is responsible to the government, which in turn is responsible to Parliament. Every action of that board and every action of the government must be subject to (parliamentary) question and review."¹

1. *Ibid*, p. 4114.

The Board began operations in 1959. Its existence and operations as a federal regulatory body assisted in the affirmation of federal authority in much the same way that the Atomic Energy Control Board (AECB) assisted in affirming federal jurisdiction over the mining, processing, use and sale of uranium.

Authority having been affirmed, in 1966 an energy department was established in the form of the Department of Energy, Mines and Resources. The new Department resulted from an amalgamation of the old Department of Mines and Technical Surveys and several branches of other departments. However, the new and important role of comprehensive policy-making with respect to energy use and development was a new and central element of the Department's responsibilities that had never been exercised by a department of the federal government and had pursuant to the *National Energy Board Act* originated from the National Energy Board.

The first Minister of Energy, Mines and Resources announced that the basic philosophy of the new department was "integration, coordination and cooperation". All of the "energy agencies" which previously had reported to several ministers, reported after 1966 to the Minister of Energy, Mines and Resources.¹ It was clear, furthermore, from statements by the Prime Minister, the new

1. The Dominion Coal Board, Atomic Energy of Canada Ltd. (AECL), Eldorado Nuclear Ltd., and Eldorado Aviation Ltd., Atomic Energy Control Board (AECB), the National Energy Board and Northern Pipeline Corporation.

Minister and from the organization of the department that the new department was to be the focal point in presenting the federal energy image to the provinces, the industry and the public. Accordingly, the department, rather than the NEB, became the prime source of policy advice to the Minister and the government. Some consideration was given at the time to amending the *National Energy Board Act* to remove the policy advisory functions from the Board, but the idea was dropped and the Department's primacy in policy development, advice and coordination was established informally.

In 1974, in response to action by the OPEC countries in raising the international price of crude oil, Parliament approved the *Petroleum Administration Act*¹. The purpose of the *Act* is to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian natural gas in inter-provincial and export trade. Under the *Act*, the National Energy Board received additional functions and responsibilities, including reporting on a monthly basis to the Minister, the Board's determination of a "just and reasonable price in relation to the public interest" for oil in the export market, the supervision and regulation at the direction of the Governor in Council of the movement of crude oil out of an exporting province and the administration of certain parts of the *Act*, if required to do so by the government.

1. *Petroleum Administration Act*, S.C. 1974, 75, 76, C-32.

3. REGULATION OF BROADCASTING

The evolution of the regulation of broadcasting illustrates a number of important determinants which led eventually to the creation of the Canadian Radio-television and Telecommunications Commission (CRTC) as a non-departmental regulatory commission. In its infancy radio broadcasting in Canada provided an important outlet for religious groups who owned a number of radio stations. One such station was criticized for its use of radio frequencies to attack other religious groups. The Minister of Marine and Fisheries (the Hon. P. J. A. Cardin), who at the time was responsible for licensing radio outlets, cancelled the licence of the station and immediately came under heavy public criticism as a result. A Commission (The Royal Commission on Radio Broadcasting - the "Aird Commission") was established in 1928 by Mr. Cardin to examine the broadcasting situation in Canada for, in his words,

"We have reached a point where it is impossible for a member of the government himself to exercise the discretion which is given by the law...for the very reason that the moment the Minister in charge exercises his discretion, the matter becomes a political football and a political issue all over Canada...We should change that situation and take radio broadcasting away from the influence of all sorts which are

brought to bear by all shades of political parties."¹

The Report of the Royal Commission did not quite satisfy the Minister's complaints for although the Report proposed the creation of a national broadcasting system financed by government, radio licence fees and advertising, it recommended that the regulatory function remain with the Minister of Marine and Fisheries. It wasn't until 1936, with the creation of the Canadian Broadcasting Corporation (CBC), that the regulatory function began its move to an independent regulatory authority.

From 1936 until 1958 the CBC operated the public broadcasting system and made recommendations to the Minister of Transport on the issue or renewal of broadcasting licences. In making its recommendations the governing body of the CBC (the Board of Broadcast Governors) heard applications submitted to them by the Minister of Transport. With its wide powers over the public and privately-owned stations the CBC was both a competitor and regulator. This situation was adjusted in 1958 with the separation of the regulatory function from the management of the CBC. The former was located within the Board of Broadcast Governors, but the Board still only made recommendations to the Minister of Transport after a public hearing.

1. Frank W. Peers, The Politics of Canadian Broadcasting, 1920-1951, University of Toronto Press, (Toronto, 1969), p. 33.

It was not until Parliament approved the *Broadcasting Act*¹ of 1968 that the regulatory functions were located in an independent regulatory commission. The *Act* was a direct consequence of the Committee of Inquiry on Broadcasting (1965) appointed by the Secretary of State that recommended that such a commission be established independent of Parliament. In introducing the Bill that was to establish the Canadian Radio-television Commission (CRTC), the Secretary of State (the Hon. J. La Marsh) explained:

"There is...generally widespread agreement that the regulation and supervision of broadcasting...should be delegated to an independent regulatory authority, and that this body and its decision should be as free as possible from partisan political influence and the pressures of vested interest."²

The new *Broadcasting Act* set out in its preamble a 'Broadcasting Policy for Canada' which fell to the CRTC (and CBC) to implement.³ Whereas the Board of Broadcast Governors only make recommendations to the Minister after hearings, the CRTC was authorized to conduct hearings and make a decision itself with respect to licences. The issue of licences, however, was subject to Governor in Council direction in several specific areas pursuant to section 22 and an ultimate Governor in Council veto on decisions.

1. *Broadcasting Act 1967-1968*, RSC 1970, B-11.

2. Debates of the House of Commons, November 1, 1967, p. 3747.

3. *Broadcasting Act*, *op cit*, s. 3.

Prior to 1975 the Canadian Radio-Television Commission regulated telecommunications with respect only to broadcasting and cable operations under federal jurisdiction. Under the *Railway Act* and the *National Transportation Act*, the CTC (Telecommunications Committee) regulated telecommunications with respect to telephone and telegraph carriers under federal jurisdiction. In 1975, with promulgation of the *Canadian Radio-television and Telecommunications Act*, all federal regulation of telecommunications was brought under the CRTC (now the Canadian Radio-television and Telecommunications Commission). The new *Act* was based, in part, on the green paper entitled "Proposals for a Telecommunications Policy for Canada" which had been tabled in the House of Commons in April 1973. The green paper reflected the federal government's desire to bring all telecommunications regulation under one regulatory authority to ensure harmony in the development and application of existing and new telecommunications techniques and a more unified federal approach with respect to areas of overlapping federal-provincial jurisdiction. In order to handle the additional responsibilities, the CRTC was expanded to include up to nine full-time members (an increase of four) and ten part-time members (no increase) appointed by the Governor in Council. Otherwise the duties, powers and organization of the new Commission were unchanged from those of the Canadian Radio-Television Commission.

SUMMARY

The history of the evolution of the regulation of transportation, energy and broadcasting illustrates certain common and significant facts:

In the first place, non-departmental regulatory commissions were established to respond to a situation where either a) ministers wished to depoliticize the regulation of an economic sector by hiving-off, or appearing to hive-off, the function to a body operating at arms' length from the government (very seldom, however, did the government give up control completely, but usually retained significant powers of control and direction); b) federal jurisdiction was clear as a legal or constitutional fact, but the practical implications of exerting concerted federal intervention *vis-à-vis* federal-provincial and industry relations caused ministers to house the regulatory functions in a non-departmental body, rather than a department under the continuous direction and control of a federal minister; or c) the regulatory commissions initially were called upon to fill a policy vacuum, there being originally no department with policy-making responsibilities, or with the required expertise. Consequently, the commissions were often given strong advisory and investigating powers - which became *de facto* policy-making powers - along with the adjudicative responsibilities. As the public service developed its expertise and the practical legitimacy of federal jurisdiction was accepted, however, a department of government progressively assumed the lead role in policy development advice and coordination. The policy-making function, which had *de facto* been undertaken by the commissions, evolved again into a policy advisory role and there are several indications that the policy advisory role may progressively wither as the departments' expertise develops. This latest stage is illustrated in

Bills now before the House of Commons relating to the Canadian Transport Commission,¹ the Canadian Radio-television and Telecommunications Commission² and the Atomic Energy Control Board.³

Secondly, as the policy capability came to be exercised by a department under the direct control and supervision of a minister, that minister progressively assumed increased responsibility before Parliament for the policy-making function, the policies themselves and their effects.

Finally, the evolution of the Canadian regulatory commission incorporates the development of the application of the rules of natural justice, such as *audi alteram partem*, to their adjudication as adjudication becomes more complex and as the number of interested parties in any particular case increases. Consequently, the decline in emphasis on the policy-making function is balanced by increased emphasis on the adjudicative function.

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1. Bill C-33 "An Act to amend the *National Transportation Act* and the *Department of Transport Act* for the purpose of defining the objective of the transportation policy for Canada and authorizing the consequential rearrangement of powers and duties relating to transport and to amend the *Transport Act* and the *Railway Act* in respect to freight rates and other matters."
 2. Bill C-24 "An Act respecting telecommunications in Canada."
 3. Bill C-14 "An Act to provide for the regulation, control and supervision of the development, production, use and application of nuclear energy and matters related thereto".

CHAPTER II

FUNCTIONAL ANALYSIS OF REGULATORY COMMISSIONS, ADMINISTRATIVE TRIBUNALS AND APPEAL TRIBUNALS

1. REGULATORY COMMISSIONS

Each regulatory commission performs a combination of five functions that can be defined broadly as adjudicative, legislative, advisory, investigative and administrative.

It is through the exercise of the adjudicative power that regulatory commissions dispense, revoke, or apply conditions to privileges in the form of licences, permits, or certificates of convenience and necessity. In making a determination the commission usually - though not always - arbitrates amongst competing claims and interests *vis-à-vis* the privilege to be dispensed and the conditions to be attached to it. In exercising the adjudicative function the regulatory body arrives at a determination or decision which may be final and conclusive, but is usually subject to a process of review or approval by the government (i.e. the appropriate minister or the Governor in Council) and subject to appeals to the courts. In fulfilling their adjudicative roles the regulatory commissions are often required to conduct themselves in accordance with the rules of natural justice. Furthermore, they are vested with many of the powers respecting the attendance and swearing of witnesses and the provision of documents exercised by courts of law.

These powers are afforded and duties imposed by Parliament to ensure that all requisite information is made available to the commission and to ensure that the rules of natural justice are followed to safeguard the rights of applicants, intervenors and those whose actions or proposals are under examination.

The legislative or rule-making power is the authority under which the commission or tribunal makes, not individual determinations or orders, but general rules and regulations applicable to classes or categories of persons who come under the jurisdiction of the commission. Simply stated, the legislative power is the method by which regulatory commissions impose duties in regard to the privileges that have been dispensed in the form of licenses, permits and so on. Under section 16(1) of the *Broadcasting Act* for example, the CRTC may prescribe classes of broadcasting licenses, make regulations respecting the character of advertising and the amount of time that may be given to it, prescribe the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs.

The legislative power is really a power whereby a commission devises and enunciates policy within the framework of the general policy that is usually defined in the constituent act. As such it is a significant power, which is often - though certainly not always - subject to direct political control by the

appropriate minister or the Governor in Council.

This legislative power should not be confused with the authority exercised by commissions by which they devise and enunciate their own internal rules of procedure or by-laws respecting the conduct of hearings and the general conduct of business. Such rules or by-laws may or may not be subject to political control. In the case of the National Energy Board its rules do not require any approval beyond that of the Board itself.¹ In the case of the CRTC, no 'by-law' of the Commission has effect until approved by the appropriate minister.² Such by-laws relate to the fees paid to part-time members, the calling of meetings of the Commission and the conduct of business at those meetings. However, the CRTC may establish its own rules respecting the conduct of hearings, applications and complaints to the Commission without any form of government approval.³

The advisory function is almost self-explanatory. In undertaking such an activity the commission does not make a final and conclusive determination on an individual case; rather it makes recommendations to the government on policy or the ways and means by which the government may achieve stated public policy objectives, after a broad examination of a particular situation and various alternative policies or ways and means of achieving policies. Individual commissions often have a statutory mandate to keep a particular policy area under continuous study and report

1. *National Energy Board Act*, RSC 1970, N-6 s.7.

2. *Broadcasting Act*, *op cit*, s.13.

3. *Ibid*, s.21.

to and advise a minister or the government from time to time on its own initiative, or the commission may commence special studies and make recommendations only when asked to do so by the government.

The investigative function is somewhat similar to the advisory function in that a commission or tribunal may, on its own initiative or as a result of direction from the government, undertake specific investigations and report to the government or take action itself. These investigations usually relate to a particular case or situation and seldom involve an analysis of policy or policy alternatives. From time to time a commission may, in addition, carry out an investigation to assess compliance with a previous decision, order or regulation with respect to a license, tariff or fee schedule.

In undertaking an administrative function, a commission simply administers a program on behalf of the government or Parliament under rules and criteria set down by the government or Parliament. As an example, the Canadian Maritime Commission during its existence administered on behalf of Parliament a program of subventions for steamships.

While it is reasonably easy to see the conceptual distinction amongst the five functions, in practice the distinction is often blurred. Advisory and investigative functions are often combined by the constituent act or, in practice, by the commission itself.

In some instances regulatory commissions have confused the legislative with the adjudicative functions. The CRTC policy on commercial deletion, for example, has not been implemented through CRTC regulations where it should probably have been, but is achieved through "conditions of licence" attached to individual cable television licences through the adjudicative function. In addition, the internal rule-making power has a significant impact on the conduct of hearings and therefore, has an effect on the adjudicative process within individual commissions.

The following section takes each of the five functions and illustrates their mix within individual regulatory commissions using as prime illustrations the Canadian Transport Commission (CTC), the National Energy Board (NEB), the Canadian Radio-television and Telecommunications Commission (CRTC) and the Atomic Energy Control Board (AECB).

(i) Adjudicative Functions

All broadcasting undertakings and telecommunications operations under federal jurisdiction require a licence from the CRTC as do operators of commercial air and water services from the CTC. The approval of the CTC is also required for the abandonment of railway lines and passenger services. All operators of inter-provincial or international pipelines and international power lines must receive a certificate of convenience and necessity from the NEB as must exporters of oil¹ and electrical

1. For terms longer than one year.

power and importers of gas. In addition, under section 320 of the *Railway Act*, a telephone company that wishes to tie in with a telephone system operated by another company and cannot reach an agreement may apply to the CRTC for relief. In such instances the CRTC may order the second company to provide the connection "upon such terms as...the Commission deems just and expedient" and may also direct the terms and conditions under which the tie-in is installed, operated or maintained.¹ Licences from the Atomic Energy Control Board (AECB) are required for operations involving the mining, production, processing, ownership, import, export or domestic sale of materials defined as prescribed substances by section 2 of the *Atomic Energy Control Act*.

In addition to the power of most commissions and tribunals to licence, several have the additional authority to determine or regulate tariff schedules and rates. The CTC regulates railway and air fares.² The CRTC determines cablevision fees as well as tariffs and tolls related to telecommunications under federal jurisdiction. The NEB approves tariffs governing the transport of energy or energy sources by international or inter-provincial pipelines.

In reaching determinations on licence applications, fee schedules and so on, regulatory commissions adjudicate amongst competing claims and interests before arriving at a determination in favour, or largely in favour, of any one.

1. *Railway Act*, RSC 1970, R-2 ss.320(7).

2. There is a major difference in the regulation. Railways must file rates which can only be rejected if they are non-compensatory, if a captive shipper is involved or if a rate "is prejudicial to the public interest". The CTC does determine air fares, however.

Before reaching a decision the competing claims and interests are usually given an opportunity to be heard through a process of public hearings.¹ In order to allow the commissions to carry out the adjudicative function with effectiveness and efficiency Parliament has usually vested them with judicial powers. Accordingly, the NEB and CTC are constituted as courts of record. The CRTC has the powers, rights and privileges of a court of record with respect only to public hearings before the Commission. (Under Bill C-14 (the Nuclear Control and Administration Bill) the Government proposed successor to the AECEB would also be constituted as a court of record.²)

The full meaning of court of record status is unclear. However at a minimum the term is taken to mean that the acts and judicial proceedings of the body are recorded and the body must give judicial notice of its proceedings. More importantly, court of record status usually implies that the commission may impose punishment for contempt of its proceedings, subpoena witnesses and documents and have the powers of a court of law with respect to the swearing and examination of witnesses.³

An additional authority which allows them to undertake their adjudicative functions efficiently is the provision in the constituent acts of the Canadian

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1. Of the major regulatory commissions, only the AECEB does not have the statutory authority to hold public hearings. This would be corrected through parliamentary approval of Bill C-14, *op cit*.
 2. The AECEB is not constituted as a court of record.
 3. For a more thorough explanation see Sir William S. Holdsworth, History of English Law Vol. 5 (1937), p.p. 157-160; Hardinge Stanley Giffard Halsbury, Laws of England Vol. 10, 4th edition, (1973), p. 319. para. 709.

Radio-television and Telecommunications Commission and the National Energy Board which authorizes each commission to break into groups or panels to conduct hearings; a decision by a properly constituted group is deemed to be a decision by the whole commission. The *National Transportation Act* goes somewhat further, establishing modal committees for the CTC and methods of appeal from the committees to the Commission to ensure inter-modal harmony and equal treatment.¹

The individuals appointed by the Governor in Council to those commissions that perform adjudicative functions usually enjoy a security and length of tenure seldom made available to non-departmental bodies that do not perform adjudicative functions. Appointees to the CTC, NEB and CRTC hold office "during good behaviour". In the case of the CTC the terms of office are a maximum of 10 years; in the case of the NEB and CRTC the terms are a maximum of seven years. Members of the CTC may be removed by the Governor in Council "for cause". Appointees to the NEB may be removed by the Governor in Council only upon an address to the Senate and House of Commons.

On the other hand the tenure of appointees to commissions that do not adjudicate, at least through public hearings, is much less secure. For example, members of the Atomic Energy Control Board, including the President, serve at the pleasure of the Governor in Council.²

1. *National Transportation Act*, *op cit.*, s.24.

2. *Atomic Energy Control Act* RSC, 1970, A-19 ss.4(2). The President of the National Research Council is a member *ex officio*.

Parliament has also provided an additional element of immunity for the members of several regulatory commissions and other non-departmental bodies performing adjudicative functions. Pursuant to the *Statutory Minimum Salaries Act*¹ the government may not reduce the salary of an incumbent or reward through remuneration one member of a commission or a tribunal more than another.² The *Act*, which applies at this moment to the National Energy Board, the Tariff Board, the Tax Appeal Board and the International Joint Commission, is designed to immunize members of quasi-judicial tribunals from intervention by the government through salaries. The Government is now considering extending the *Act's* provisions to all quasi-judicial tribunals.

The conduct of the adjudicative function by regulatory commissions is not subject to any direct government control or direction. The decisions which result from the adjudicative process are, however, usually subject to government control and direction, even over and above the policy framework enunciated in the constituent act.³ In other words, the adjudicative process itself (i.e. the procedure whereby commissions reach decisions) is inviolable; the decisions themselves,

1. R.S.C., 1970, S-3

2. *Ibid.*, section 3.

3. The constituent acts of the CRTC and CTC define respectively a broadcasting policy and transportation policy in fairly explicit terms. No "energy policy" is defined for the NEB by its constituent act, nor does the *Atomic Energy Control Act* specify a policy for the AECEB, because these latter commissions were established in large part to assist the government in devising policy.

however, are not.¹ This distinction is vitally important to an understanding of the regulatory process.

Under the *Broadcasting Act* the issue, amendment or renewal of any broadcasting licence may be set aside or referred back to the Commission. The Governor in Council must set forth the details of any matter that he considers were not adequately considered although the reasons given may be very broad and general.² Even if the Commission confirms the decision, it may be set aside again by the Governor in Council.³ Further, the Governor in Council may issue general directions to the CRTC setting out the maximum number of channels or frequencies that may be assigned within a given geographic area; the reservation of channels or frequencies for use by the CBC or any "special purpose" established by the Governor in Council; the classes of applicants to whom broadcasting licences may not be issued or to whom renewals or amendments may not be granted.⁴ Furthermore, no licence may be issued by the Commission until the Minister of Communications has certified that the operator has satisfied the technical requirements under the *Radio Act*. Finally the Minister may overturn any condition attached by the Commission to a licence awarded to the CBC.

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1. This accounts for the Prime Minister's statement which prohibits ministerial intervention on a case which is *sub judice* before a court of record. See Right Hon. P.E. Trudeau, *Debates of the House of Commons*, March 12, 1976, p.p. 11770-11772. The statement clearly covers the NEB, CTC and CRTC as well as most administrative and appeal tribunals.
 2. *Broadcasting Act*, *op cit.*, ss.23(1).
 3. One could assume that this could go on *ad nauseum* for the *Broadcasting Act* has no provision whereby the Governor in Council of the CRTC may make a final decision.
 4. *Broadcasting Act op cit.*, ss.22(1).

The NEB, with the approval of the Governor in Council, may issue a certificate of convenience and necessity for the construction and operation of a pipeline or international power line. Section 44 of the *National Energy Board Act* sets out criteria which the Board must ensure are satisfied before issuing any certificate. Governor in Council approval is also required for the Board to revoke or suspend a certificate. The issue of licences for the export of oil¹, gas and power and the import of gas by the Board and their revocation and suspension are subject to government approval. Further, section 83 of the *Act* defines considerations that must be met by the licensee before the Board may issue a licence and section 85 authorizes the Governor in Council to make regulations that must be satisfied by the Board in issuing export licences.

Under the *National Transportation Act* any decision by the CTC regarding the issue of a licence to conduct a commercial air service, engage in transport by water, operate a commodity pipeline, or operate a motor vehicle undertaking may be appealed to the Minister of Transport and the Minister may issue binding "opinions" to the Commission.² (Under the *Aeronautics Act* the Air Transport Board required only the approval of the Minister for its licencing decisions). In all other areas the decisions of the CTC are subject to review and appeal by

1. Except oil exports of a duration shorter than one year.

2. *National Transportation Act*, *op cit*, ss.25(1).

the Governor in Council, either on petition by an interested party, or on the Governor in Council's own motion, at any time. Further, the Governor in Council may "vary or rescind" any order or decision of the CTC "and any order that the Governor in Council may make with respect thereto is binding on the Commission."¹

(ii) Legislative Functions

The *Broadcasting Act* confers upon the CRTC the authority to make regulations respecting standards of programs, character of advertising, use of dramatization in political broadcasts, the nature of information to be submitted to the Commission and "such other matters as it deems necessary for the furtherance of its objects",² and all such regulations must be published in the Canada Gazette to allow licensees and other interested parties to make representations.³ This particular regulation-making power is not subject to any government approval or other form of control, continuing the situation that was in force prior to the *Broadcasting Act* of 1968 in the case of Board of Broadcast Governors.

Under the *Railway Act*, in regard to telecommunications, the CRTC is authorized to place telephone and telegraph messages into classes for purposes of rates and devise regulations which prescribe the terms and conditions under which traffic may be transmitted by a telecommunications company. Such regulations do not

1. *Ibid*, s.64(1)

2. *Broadcasting Act*, *op cit*, ss.16(1)

3. *Ibid*, ss.16(2)

require ministerial or Governor in Council approval.

The CTC has legislative powers similar to those of the CRTC respecting railways, air transportation and inter-provincial trucking. Again there is no form of government approval of regulations required.

The legislative powers of the NEB are far more circumscribed in that the Board is empowered to make regulations without some form of government approval only on limited technical matters such as company accounting systems and information to be supplied to the Board. The exercise of the Board's legislative functions with respect to non-technical areas such as public safety, protection of property, the location of international power lines, the export of gas and power and the import of gas are subject to approval by the Governor in Council. The Board of Transport Commissioners, during its period of regulating many of these areas, was allowed to make many regulations such as these without any form of government control, illustrating that the impact, for example of gas exports, on national policy has become so significant that the government, in 1959, found it necessary to bring it under direct control.

As another example, the AECB is given broad legislative powers, but may only exercise them with the approval of the Governor in Council,¹ a practice that Bill C-14 (the Nuclear Control and Administration Bill) would extend to the proposed Nuclear Control Board.

1. *Atomic Energy Control Act, op cit.*, s. 9.

(iii) Advisory Functions

Of the major regulatory commissions and administration tribunals, the CTC and NEB have the most significant advisory powers and duties. The members of the NEB have broad advisory functions set out in the NEB's constituent act and in the exercise of those powers have all the powers of commissioners under Part 1 of the *Inquiries Act*.¹ The NEB also has statutory advisory duties under section 9 of the *Petroleum Administration Act* related to just and reasonable prices for export oil. Section 23 of the *National Transportation Act* sets out in detail the powers and duties of the CTC in advising the government on transportation policy. In fact in this regard the *National Transportation Act* illustrates that the CTC is a fusion of the quasi-judicial adjudicative functions formerly exercised by the Board of Transport Commissioners, with the advisory functions previously carried out by the Air Transport Board and Maritime Commission.

By inference the *National Transportation Act* relegated the Department of Transport to a secondary role in providing policy advice to the Minister. In the late 1960's, however, when the Department became a Ministry, thereby emphasizing its policy development and coordination role and its responsibilities to initiate policy advice, there were in existence two competing sources of policy advice. A task force was set up within the Ministry in 1974 and proposed that the Ministry be confirmed as the prime source of policy advice to the Minister of Transport and also recommended that the

1. See Chapter III below for a discussion of these powers.

Minister's primacy in policy development, enunciation and coordination be formalized by giving him the power to issue binding directions on policy matters to the CTC.¹ Those proposals have since been approved by the Minister and Cabinet and have been put before Parliament in the form of Bill C-33. Similarly, the Telecommunications Bill now before Parliament will confirm the Department of Communications as the organization with principal responsibility to initiate policy advice for the Minister and confirm the Minister as the focus of responsibility for decisions on communications policy.

This is not to say, of course, that the commissions involved will no longer make policy through adjudication and legislation-making in areas where no government policy has been enunciated. Nor would the policy-making process be undertaken completely within departments. In addition, the Minister of Transport has indicated that in several instances the CTC will be asked to hold public hearings and make a report to the government in relation to a proposed direction to the Commission, thereby giving the Commission a significant role in advising the government on policy. What the above-mentioned bills would do, however, is reaffirm ministers' responsibility for policy and their respective department's primacy in the initiation of policy advice to ministers.

(iv) Investigative Functions

Several regulatory commissions have a mandate

1. J.R. Baldwin, *op cit.*, pp. 50-51.

to carry out investigations on behalf of the government. Further, each commission undertakes investigations to ensure compliance with licence requirements, conditions, standards and regulations. For the performance of these functions the commissions are usually given special powers.

Under both the *Railway Act* and Section 5 and 8 of the *Aeronautics Act* the CTC must undertake investigations with respect to railway and commercial air accidents, either at the direction of the government or on its own initiative. By establishing the Commission as a court of record Parliament has assured the Commission the ability to undertake this function - along with the adjudicative function - effectively.

Similarly, the AECB investigates accidents involving the mining, processing and use of prescribed substances, and, through inspectors ensures that conditions of licences granted by the AECB are being met. Further, the AECB acts as the investigative and enforcement arm for the Government of Canada with respect to bilateral and multi-lateral safeguards agreements.

The National Energy Board undertakes accident investigations with respect to pipeline ruptures and similar occurrences within its regulatory mandate. Inspectors from the Board also monitor pipeline construction to ensure compliance with the NEB's certificates of convenience and necessity. Court of record status and the powers of commissioners under Part I of the *Inquiries Act* provide to the NEB powers to exercise these functions effectively.

(v) Administrative Functions

The CTC administers a variety of subsidies on behalf of the government under various statutes. In the rail area subsidies for passenger services and non-economic rail lines are administered by the CTC as are intra-regional subsidies and regional air carrier subsidies.

Under the *Petroleum Administration Act* the National Energy Board is empowered to administer certain sections of that *Act* on behalf of the Minister of Energy, Mines and Resources.

2. THE FOREIGN INVESTMENT REVIEW AGENCY (FIRA)

Most commentators on the subject class FIRA, along with the CTC, CRTC, NEB and AEBC, as a regulatory commission. However, FIRA's credentials to be included in such a class are tenuous indeed. In the first place, unlike the CTC, NEB and CRTC, FIRA performs no adjudicative function. All decisions on allowing or disallowing foreign takeovers or new businesses under the *Foreign Investment Review Act*¹ are taken by the Cabinet on the recommendation of the Minister. FIRA's role in that process is solely advisory. FIRA itself, therefore, makes no decisions or final determinations, neither does it issue any licences or permits. Probably as a consequence of the fact that it has no adjudicative function, the Commissioner of FIRA, like the members of the AEBC, serves at the pleasure of the Governor in Council. In addition, and also like the AEBC, FIRA is not constituted as a court

2. *Foreign Investment Review Act* (assented to December 12, 1973), *Statutes of Canada*, RSC 1973-74, Chapter 46.

of record, nor do its members have the powers of commissioners under Part I of the *Inquiries Act*.

Secondly, unlike the AECB, CTC, CRTC and NEB, FIRA has no legislative function whatsoever. Under the *Act*, all legislative functions are undertaken directly by either the Minister or the Governor in Council. Finally, FIRA has no administrative function as has been defined for purposes of this paper. Its investigative functions are those related to advising the government on foreign takeovers and new businesses and the members of FIRA have no special powers in this regard.

FIRA, therefore, as the *Act* itself suggests¹ has more of the attributes of an advisory body than a regulatory commission. Furthermore, the Agency is constituted to advise and assist the Minister designated for purposes of the *Act*. The Commissioner is responsible to the Minister in all respects, not to Parliament; his position is accordingly more analogous to that of a deputy head of a department rather than the head of the usual regulatory commission. Finally, the administrative support necessary to the functioning of the Agency is provided from the department at the discretion of the Minister.

3. ADMINISTRATIVE TRIBUNALS AND APPEAL TRIBUNALS

The major distinction between regulatory commissions on one hand and administration and appeal tribunals² on the other is that the former exercise

1. *Ibid.*, ss.7(1)

2. See footnotes 3 and 4 on p. 2-33 for a list of these bodies.

important adjudicative and legislative as well as advisory, administrative and investigative functions. Administrative tribunals, however, are essentially adjudicative and investigative organizations. Only one or two administrative tribunals exercise advisory functions. Appeal tribunals, for their part, are entirely adjudicative. Of primary significance is that administrative and appeal tribunals seldom perform a legislative function; they seldom have a statutory role in policy development or enunciation *per se*. The policy that applies to them has usually been defined by Parliament through the constituent act and is implemented by its application to individual cases to reach particular decisions.

Because of their principal adjudicative role, administrative and appeal tribunals have, in the main, a structure and powers significantly more judicialized than those of regulatory commissions.

The majority of appeal and administrative tribunals are often either constituted as courts of record, or their members have all the powers of commissioners under Part I of the *Inquiries Act*. In practice there is not a great distinction between court of record status and the powers of commissioners under Part I of the *Inquiries Act*. If there exists a practical distinction, it is that it is clear that a court of record may punish for contempt in the same way as any court of law; it is not completely clear that commissioners under Part I of the *Inquiries Act* could apply the same sanction.

In most instances, however, court of record status has been vested or retained in a body because it carries with it the implication of a higher status than that implied by the powers of commissioners under Part I of the *Inquiries Act*.¹

Like members of regulatory commissions that perform adjudicative functions, members of appeal tribunals and administrative tribunals, as a rule, have a secure tenure of office. The majority of members serve "during good behaviour" and are removable only "for cause" by the Governor in Council. Some incumbents, such as the Chairman and Vice Chairman of the Public Service Staff Relations Board, hold office for up to 10 years, hold office "during good behaviour" and may be removed by the Governor in Council only by an address to the Senate and House of Commons.

In the above respect, administrative tribunals and appeal tribunals are no more judicialized than many regulatory commissions. However, whereas only one constituent act of a regulatory commission (CTC)² requires legal experience and a judicial background, the constituent acts of appeal tribunals and administrative tribunals more frequently require that the members have sound judicial credentials. Appeal bodies are the most

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1. Several appeal tribunals (e.g. the Tax Review Board) are more judicialized in this respect and have all the powers, rights and privileges as are vested in a superior court of record with respect to the attendance, summoning and examination of witnesses. For a discussion of the distinctions between a superior and inferior court, see Halsbury, *op cit.*, p. 320, para. 710 ("Superior and Inferior Courts") and the Canadian Encyclopedic Digest (Ontario), 3rd edition, Vol. 6, (October 1974) pp. 2-3, pp. 34-35.
 2. One of the Vice Presidents of the CTC must be a barrister or advocate of at least 10 years standing, *National Transportation Act*, *op cit.*, ss.7(3).

judicialized in this respect. For example, the Chairman of the Pension Appeals Board and at least two members must be judges of the Federal Court of Canada or a superior court of a province; the Chairman of the Immigration Appeal Board and the Vice Chairman must be barristers or advocates of at least five years standing at a provincial bar; of the maximum of seven members appointed to the Tax Review Board, at least two must be judges of a superior court or barristers of at least 10 years standing.

Emphasizing their adjudicative as opposed to legislative roles, very seldom will an appeal or administrative tribunal have the power to make regulations. For example, all regulations under the *Parole Act* respecting the length of a term that must be served before parole may be granted by the Board, are made, not by the National Parole Board, but the Governor in Council. Further, and as is the case with most regulatory commissions, internal rules of procedure may be devised by the individual tribunals, but often require the approval of the Governor in Council. Most constituent acts require, in addition, that all such rules be published in the Canada Gazette. Appeal and administrative tribunals such as the Public Service Staff Relations Board, and the Cultural Property Export Review Board, that do not require Governor in Council approval of rules of procedure, are a distinct minority.

The decision by an administrative tribunal "may be final and conclusive" in its own right or may simply be referred to the government for further action.

For example, the Deputy Minister (Customs and Excise), Department of Revenue, makes a final determination upon receipt of an "order or finding" of the Anti-Dumping Tribunal.¹ Similarly the Restrictive Trade Practices Commission makes a report to the minister² after hearing a case and any subsequent action is taken either by the minister or the Attorney General. The decisions of several administrative tribunals such as the Canada Labour Relations Board are, on the other hand, final and conclusive in their own right and require no further action to be enforced.

Most administrative tribunals may initiate proceedings on their own initiative³ or at the instigation of a non-government third party. A few administrative tribunals, however, act only at the instigation of the government or a government official. For example, the Anti-Dumping Tribunal goes into operation at the instigation of the Deputy Minister (Customs and Excise) National Revenue; the Tariff Board acts at the instigation of the Minister of Finance or the Governor in Council. Several tribunals, such as the Restrictive Trade Practices Commission, may initiate proceedings on their own or in response to a direction from the government. Appeal tribunals, on the other hand, are almost always able to initiate proceedings without any government direction.

1. *Anti-Dumping Act* 1968-69, RSC, 1970 A-15 ss.17(1).

2. *Combines Investigation Act*, RSC, 1970, C-23, s.19.

3. For example the Canada Labour Relations Board, the Canadian Pension Commission, National Parole Board, Textile and Clothing Board.

Of the major administrative tribunals only the Textile and Clothing Board exercises an advisory function as has been defined for purposes of this paper. The Board was established in 1971 to assist in the implementation of the federal government's textile policy. As such the Board has a major responsibility not only to hear complaints from the industry and make decisions on special measures of protection which are later acted upon by the government, but also to advise the industry on reorganizations and the government on adjustments to the textile policy.¹

4. A CONTINUUM OF CONTROL TO INDEPENDENCE

Broadly speaking regulatory commissions, administrative tribunals and appeal tribunals represent three stages in a continuum of control and independence *vis-à-vis* government and Parliament, aside from the adjudicative function whose immunity from intervention

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1. See the *Textile and Clothing Board Act*, Statutes of Canada 1970-71-72, c.39. Basically the Board has four major responsibilities that fall neatly into either the adjudicative or advisory category;
 - (a) conduct inquiries to ascertain whether particular textile and clothing goods are being imported under such conditions which threaten injury to Canadian producers;
 - (b) rule on the acceptability of adjustment plans submitted by the Canadian producers;
 - (c) decide whether or not a recommendation should be made to the Minister of Industry, Trade and Commerce to implement special measures of protection;
 - (d) determine the eligibility for benefits under the 'Adjustment Assistance Regulations' of textile workers who have been laid off.

during the process is constant.¹ Only in the case of rules of procedure applying to the conduct of the adjudicative process may bodies which exercise an adjudicative function be subject to some government control and direction.

Pursuant to the statutory framework which Parliament has set down, as a general rule regulatory commissions are the most susceptible of control and direction by the ministry. As has been illustrated, the decisions made by regulatory commissions usually require some sort of government approval or are subject to some form of government review. Similarly the legislative and advisory functions administered by regulatory commissions are usually subject to government control and direction.

Administrative tribunals, because their overall function is largely adjudicative, are more immune from government intervention when compared to regulatory commissions. Although in most cases their decisions have no effect without some subsequent government action, in some cases, as has been illustrated, their decisions are final and conclusive in their own right.

Appeal tribunals, illustrating a further step on the continuum, are almost entirely adjudicative; their decisions seldom require any government action to come into effect and there are seldom any provisions for government review or approval.

1. See Chapter III for a more detailed discussion.

CHAPTER III

MINISTERS AND REGULATORY COMMISSIONS,
ADMINISTRATIVE TRIBUNALS AND APPEAL TRIBUNALS

Without exception, under the existing statutory framework, the conduct of the adjudicative function by these three types of non-departmental bodies is immune from intervention, direction and control by ministers. The policy or criteria that are applied and the decisions that result from that process, however, are not. While Parliament has given ministers power, either jointly (in the form of the Governor in Council) or individually, to refer back, vary, rescind or approve decisions, regulations and orders which result from the adjudicative process, Parliament has clearly not given ministers equivalent powers with respect to the adjudicative process itself.

Ministers, therefore, cannot be responsible for what happens during the process of adjudication by a regulatory commission, administrative tribunals or appeal tribunals, for Parliament has given them no means of fulfilling any such responsibility. Ministers are not, therefore, accountable to Parliament in this particular context. Consequently, when questions are raised in Parliament related to a particular matter under adjudication, or which has been the subject of adjudication, ministers first of all should refuse to intervene, and secondly, if an answer is made, respond "on behalf" of the body,

taking no direct responsibility.¹ Only in an instance where serious deficiencies or errors are occurring or have occurred through the adjudicative process and are brought to the attention of the minister should he intervene to correct the problem and be held accountable before Parliament for his actions.

However, with the exception of appeal bodies, where their decisions are usually final and conclusive and not subject to any government intervention, the decisions which result from adjudication by regulatory commissions and administrative tribunals are almost always subject to some government control, either through appeals or the requirement that the decision be approved by a minister or the Governor in Council. In cases where a decision requires such "political" approval, or where a minister or the Governor in Council has reviewed a decision either on appeal or on his own motion, the ministry, through the appropriate minister, becomes responsible for the decision and accountable for it and its affects before Parliament. Consequently, when a parliamentary question is asked referring to such a decision, the minister on behalf of the ministry should take direct responsibility in responding and not answer "on behalf of" the body.

1. For a recent illustration of this, see Debates of the House of Commons (April 26, 1977) p. 4991 for an exchange between Mr. R. Gordon Fairweather, M.P. and the Hon. Alastair Gillespie, involving the National Energy Board.

CHAPTER IVREGULATORY COMMISSIONS, ADMINISTRATIVE
TRIBUNALS, APPEAL TRIBUNALS AND PARLIAMENT

The primary direct contact between Members of Parliament, commissions and tribunals occurs through the various committees of Parliament. This contact usually occurs via the Standing Committee on Miscellaneous Estimates or through a policy committee with respect to hearings on annual or supplementary estimates. Furthermore, most commissions and tribunals must submit to Parliament, through the designated minister, an annual report and from time to time orders of reference have been issued for a committee to undertake hearings with respect to it. In addition, in one or two instances regulatory commissions at least have been called before a parliamentary committee and been asked to provide advice on policy.¹ However, the main contact occurs in the context of estimates. Obviously, commissions and tribunals are expected to account at such times for their past performance.

Although the practice is far from constant across the spectrum of commissions and tribunals, some have refused to answer questions related to the conduct of the adjudicative function with respect to a specific case or issue. As one illustration, a former President

1. See, for example, testimony of the CTC before the Standing Committee on Transportation and Communications, 28th Parliament, 4th Session, 1972, p.7:14.

of the CTC refused to discuss the Commission's decisions to authorize CNR to discontinue its trans-Newfoundland passenger services on the grounds that the CTC was a "court of law" and, therefore, should not be expected to justify its decisions before the legislature, or enter into a discussion of particular cases on their resolution by adjudication.¹ In such a situation, the Committee would have been better advised to put the question to the Minister of Transport who along with the ministry, had sufficient statutory powers to review the decision and, if necessary vary, or rescind it or issue a direction to the CTC on it.²

Commissions and tribunals, as one might anticipate, have responded to queries from parliamentary committees related to the conduct of the legislative function. For example, the CRTC appeared before the Standing Committee on Broadcasting and Assistance to the Arts and explained its decision to apply a condition to television licences respecting the deletion of US commercial advertising.

Should a Committee of the House of Commons or the Senate decide that it is not satisfied with responses by officials of a commission or tribunal appearing before it or is not satisfied with the general performance of the commission or tribunal or any one of

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1. House of Commons, Standing Committee on Transportation and Communications, "Revised Main Estimates (1968-69) of the Canadian Transport Commission", 28th Parliament, 1st Session, November 28, 1968, pp. 95, 96, 98.
 2. Pursuant to s. 64, *National Transportation Act*, *op cit*.

its officers, it may note such dissatisfaction in its report to the House of Commons or Senate. These reports not only have an impact on the commission or tribunal, but in addition if the complaints are sufficiently serious, the requests serve to put pressure on the minister and ministry to take corrective action.

Finally, under the *Statutory Instruments Act* regulations of regulatory commissions, administrative and appeal tribunals and directives to them that are defined as "statutory instruments" for the purposes of the *Act* must be certified by the Clerk of the Privy Council and may then be scrutinized by the Standing Committee of the Senate and House of Commons on Statutory Instruments. The purpose of review by the Clerk and the Standing Committee is to ensure that regulations and directives are authorized by statute, do not constitute an unusual or unexpected use of the authority, do not trespass unduly on existing rights and freedoms, are not inconsistent with the Canadian Bill of Rights and the form and draftsmanship are in accordance with accepted standards. It is important to note that this scrutiny pertains only to the legitimacy of regulations and directives, not to their effectiveness in pursuing policy objectives.

As indicated in the General Introduction of this paper, Parliament may ask questions of the minister or ministry relating to commissions and tribunals. The minister or ministry should respond to those questions by taking direct responsibility for actions only when the minister or ministry may exercise effective control or direction over these actions. In other instances the ministry should answer on behalf of the commission or tribunal and assume no direct responsibility.

CHAPTER V.CROWN CORPORATIONS AND REGULATORY COMMISSIONS

Crown corporations and regulatory commissions are two methods whereby the federal government intervenes in the economy. In those instances where regulation of private economic activity could ensure the achievement of public policy objectives, regulatory commissions have been established. In other instances the achievement of public policy objectives required or requires direct government participation through complete or partial ownership of the business enterprises. However, in some economic sectors, the achievement of public policy objectives has required both regulation and government ownership. Consequently, in several sectors federal Crown corporations, mixed or joint enterprises, fall under the jurisdiction of federal regulatory commissions. In such instances the practice has traditionally been that the Crown corporation is in a privileged position as a "chosen instrument" of the Government of Canada while the mixed and joint enterprises are treated in generally the same fashion as private sector corporations. For example, under the *Broadcasting Act*, the Minister may overturn conditions attached to a licence of the CBC by the CRTC and the *Act* requires consultation between the CRTC and the CBC on those conditions when requested by the CBC. If the CBC and CRTC are unable to reach agreement, the issue may be referred to the Minister who will issue a directive to the Commission.

Prior to the recent passage of the new *Air Canada Act*, pursuant to the previous *Air Canada Act* and the *Aeronautics Act*, the CTC (and before it the Air Transport Board) was required to grant to Air Canada (or in the case of the Air Transport Board, Trans-Canada Airlines) all licences at such terms and conditions as were necessary to fulfill the obligations of the Corporation. Under the *Air Canada Act* now in force, the "special status" of Air Canada, in this regard, has been removed.

In the case of the AECB, the *Atomic Energy Control Act* is unclear as to the jurisdiction of the Board with respect to Crown corporations. In practice, however, the AECB has regulated Crown corporations in the same fashion as enterprises in the private sector and no conflict has arisen which required arbitration by the government. Under the Nuclear Control and Administration Bill the Government has proposed that the jurisdiction of the Nuclear Control Board be confirmed with respect to Crown corporations and Crown corporations be treated in the same fashion as private sector companies.

CHAPTER VICONCLUSIONS

It is a common notion that regulatory commissions, administrative tribunals and appeal tribunals are really very much like courts of law and that once decisions or determinations are made by them those decisions should not be subject to "political appeals" or any form of political control.

Such a conception would be both accurate and proper if regulatory commissions and administrative tribunals, like courts, only administered the laws set down by Parliament. Granted their major - and possibly the most publicly-visible-role is the conduct of the adjudicative function. However, as previous chapters of this paper have illustrated, tribunals and especially regulatory commissions have additional significant responsibilities. Many if not most, exercise significant legislative functions within the framework of their constituent acts. In areas where no government policy direction or guidance has been provided the legislative function provides to the commissions and tribunals a significant independent role in policy-making. Several commissions and tribunals administer programs on behalf of the government and many play a significant role in advising the government on policy and the ways and means of implementing stated government policy objectives. In the performance of these latter functions, regulatory commissions and administrative tribunals look more like departments of government than courts of law. In the exercise of their adjudicative function, commissions and

tribunals - like courts - are immune from political intervention; in the exercise of the legislative, administrative and advisory functions they are almost invariably subject to government direction and control.

Regulatory commissions and administrative and appeal tribunals exist largely because the adjudicative role which they perform could not be performed by departments under the more or less continuous direction and control of a minister. As previous chapters have indicated, commissions and tribunals are uniquely constructed to dispense privileges - usually amongst competing interests - and arbitrate rights. In performing this function they act very much like courts in seeing that the rules of natural justice are applied and also ensuring through their court-like powers that all relevant information is available to the proceedings. Furthermore, the establishment of a non-departmental, as opposed to departmental, body often made it easier for the provinces and the industry to accept federal regulation and for the government to establish a body of expertise.

Adjudication as undertaken by regulatory commissions, administrative and appeal tribunals, has to be and seen to be, conducted without government interference so that applicants and intervenors may be assured of a fair and complete hearing without outside interference. Consequently, the process of adjudication has been insulated from government interference and in many cases, the commissions and tribunals are required to act in a quasi-judicial fashion abiding by judicial rules of procedures and the rules of natural justice.

It should be emphasized that the results of adjudication were not intended to be and are not inviolable, since in the majority of cases, government approval is required before a decision may take effect, or the Governor in Council or minister may overturn, vary or affirm a decision either on petition or on his own motion. Finally, throughout adjudication the commission or tribunal must apply the policy which has been defined by Parliament in the constituent act as well as applying its own regulations and orders, most of which are subject to some form of government approval.

As was indicated in the General Introduction to this paper, the extent of ministerial responsibility for any organization before Parliament should be defined by the powers and duties of direction and control over the body which have been vested with the minister by Parliament. In the case of regulatory commissions and administrative tribunals, therefore, a minister is accountable, either individually or on behalf of the ministry for those functions over which the minister or ministry exercises effective control. From the foregoing, it should be obvious that the powers of control and direction vary almost from organization to organization. At one extreme is the Foreign Investment Review Agency which simply advises the Minister and is not authorized to make any decisions and whose members serve at the pleasure of the Governor in Council. Similarly, section

7 of the *Atomic Energy Control Act* gives to the Minister the power to issue to the AECB binding directions of a general or specific nature, all members of the Board serve 'at pleasure' and the Board is listed in Schedule B of the *Financial Administration Act* - a group of corporations over which the minister is to exercise "more or less continuous direction and control." The majority of commissions and tribunals have more independence.

As a general rule a minister is accountable to Parliament for the effectiveness with which a commission or tribunal implements stated government policies. He fulfills this responsibility through control over the decisions and determinations of the bodies, his (or the Governor in Council's) control over the legislative functions and, as discussed in the General Introduction, through approval of budgetary submissions. Ministers individually or jointly are not accountable for specific decisions reached by a commission or tribunal. However, where a right of appeal to the Governor in Council exists or where appeal to the Governor in Council approval is required for a decision to take effect, the ministry becomes responsible for that decision.

Ministers, since they do not have the necessary means of control and direction, cannot be responsible for the recommendations made by a commission or tribunal as a result of exercising advisory duties, their

determinations resulting from an investigation, or the management of an activity on behalf of Parliament or the government. Finally, the powers of internal, day-to-day administration are vested with the heads of the tribunal or commission, consequently the minister has no active responsibility for the conduct of those activities. Where the minister or ministry is not responsible, the commission or tribunal is responsible directly to Parliament.

PART III

PUBLIC ENTERPRISE

"Americans have, or at least had, a genius for private enterprise; Canadians have a genius for public enterprise."¹

Introduction

Economic and social regulation by a government commission or tribunal is one method by which governments may intervene in the economy and bring considerations related to the public interest to bear on private economic decision-makers. Governments may also regulate, circumscribe or otherwise influence private economic decision-making through taxation, labour, combines and anti-dumping legislation, foreign investment review, wage, price or profit controls, loan guarantees, direct subsidies and price supports.

In addition, most governments have found it necessary, from time to time, to intervene more directly in the economy through the actual ownership of business enterprises. Ownership may be established through nationalization, where the state acquires the assets or the ownership of an existing corporation. On the other hand, the state may establish and operate a business enterprise on its own or may acquire shares in a new or existing enterprise to be operated in partnership with the private sector, another national government, or provincial government.

1. Herschel Hardin, A Nation Unaware: The Canadian Economic Culture, J. J. Douglas, Ltd. (Vancouver, 1974) p. 140.

In Canada, the federal government has employed all three modes of public enterprise although nationalization, in the strict sense of the Morrisonian² doctrine, has been uncommon. The "nationalization" of several companies, including Canadian National, Canadair, and de Havilland were more of the nature of rescue operations. The nationalization in 1944 of Eldorado Mining and Refining (now Eldorado Nuclear Ltd) was undertaken to obtain a secure source of uranium for the war effort.

In any event, the federal government has established and continues as the sole owner of a large number of corporations engaged in a wide variety of undertakings. In addition, the federal government retains a controlling or minority interest in a number of corporations.

For purposes of this paper, this type of non-departmental body which always takes the corporate form, has been broken down into two groups: Crown corporations and joint or mixed enterprises.

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1. Lord Morrison of Lambeth, often called the father of nationalized industry in the United Kingdom, saw the nationalization of industries, especially economically strategic ones, as an end in itself, providing the means whereby the British people, through government ownership, became masters of industry, rather than simply employees and customers. His views had considerable impact on the Labour Party during that Party's period in government after the second World War. See William A. Robson, Nationalized Industry and Public Ownership, George Allen and Unwin Ltd., London, 1960.

Crown corporations, again for purposes of this paper, are defined as those corporations that are wholly-owned, whether directly or indirectly, by Her Majesty in right of Canada and report to Parliament through a minister.¹ Many - though certainly far from all - such corporations are listed in Schedule B, C, or D of the *Financial Administration Act*. Prior to 1969, it was safe to say that Crown corporations were usually incorporated by a special act of Parliament. With increasing frequency since 1969, however, Crown corporations are being incorporated by ministers under companies legislation such as the *Canada Corporations Act* and *Canada Business Corporations Act*, often pursuant to statutory authority.²

On the other hand, a mixed enterprise, for purposes of this paper, is a corporation, part of whose share capital is held by private shareholders. A joint enterprise, for purposes of this paper, is a corporation, part of whose share capital is held by another government (either provincial or national), or where another government exercises powers or rights usually associated with share ownership, such as the appointment of directors. Like a Crown corporation, a mixed or joint enterprise may be established by a special act such as the

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1. This varies somewhat from the definition of "Crown corporation" found in federal legislation such as the *Financial Administration Act* (section 66) or the inference left by the *Income Tax Act* (subsection 149(1)(d)).
 2. See, for example, section 10 of the *Atomic Energy Control Act* and subsection 8(3)(c) of the *Department of Regional Economic Expansion Act*.

Canada Development Corporation Act or the Telesat Act.

More often, however, the corporation has been established under companies legislation and the enterprise is governed by that legislation.

Contrary to that which several commentators on the subject have written, the corporate form of government administration did not begin with the wartime corporations of 1939-45 (the so-called "C.D. Howe corporations"), the Depression-era corporations, or even the CNR in 1919. The first recorded use in Canada of a government employing the corporate form in government administration is the establishment in 1839 of a Board of Works to construct a canal system in Lower Canada.¹ Prior to 1867, the government of the United Provinces of Canada established a publicly-owned corporation to administer the harbour facilities at Montreal, a device that was used frequently after Confederation by the Dominion Government to administer harbours.²

In establishing such organizations the colonial government was drawing on experience in Britain where in the early 1800's the British Parliament had established "harbour commissions, river conservations and the like"³ and had conferred upon them corporate powers and structures.

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1. In 1841 the Board's jurisdiction was extended to the United Provinces.
 2. In 1936 all harbours previously administered by separate government-owned companies were amalgamated under the National Harbours Board reporting to the Minister of Transport.
 3. T.B.Napier, "The History of Joint Stock and Limited Liability Companies", Chapter XII, A Century of Law Reform, Macmillan and Company Ltd., (London, 1901, p. 389).

(Adam Smith, in his Wealth of Nations (1776) had concluded long before that the corporate form of administration was best suited to the making and maintaining of canals and supplying water to cities.) In using the corporate form of government administration to develop and expand the Canadian economic infrastructure, the government was resorting to a principle of public administration that would be reflected throughout our history as well as that of countries at a similar stage in development and grappling with similar problems of development such as the United States and Australia.

Incidentally, the early British and first Canadian publicly-owned corporations pre-dated, by at least a decade, the establishment of the first limited liability companies under the British Limited Liability Acts of 1855 and 1856.¹ They also pre-dated the creation of private corporations² by more than half a century.

Now the Canadian government owns directly or indirectly some 178 corporations and is either directly

1. For a discussion of the evolution of Brithish company law in this respect see Napier, *Ibid.*; Chambers Encyclopedia (New Revised Edition), (London: International Learning Systems Corporation Ltd.), Volume VIII, p.p. 128-130; and Encyclopedia Britannica (Encyclopedia Britannica, Inc.), Volume 6, p.p. 219-221.

2. Under the *Companies Act* of 1907.

or indirectly a majority shareholder in some 131 corporations and a minority shareholder, directly or indirectly, in 71.¹

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1. From data compiled by the Financial Administration Branch, Treasury Board Secretariat (April 10, 1978). For the names of these corporations and their categorization see Appendix B. These figures do not include those corporations in which the federal government has assumed a minority of the issued shares as security for financing through, for example, the Department of Regional and Economic Expansion. In such situations, the Government's position as shareholder is a temporary phenomenon.

CHAPTER I

The Morrisonian Concept of the "Public Corporation" and the Canadian Crown Corporation

If one were to construct a model public corporation based on the Morrisonian concept, that model would probably consist of all or many of the following attributes.

The model corporation would probably have been established by an act of Parliament. Like corporations in the private sector, it would have the ability to sue and be sued in its own name and acquire, hold and dispose of property in its own name.

Using today's terminology, the "business and affairs" of the corporation would be the responsibility of a board of directors appointed by the responsible minister or Cabinet and enjoying a security of tenure greater than directors in the private sector. Directors would not be chosen from the ranks of the public service or the ministry; rather, directors would be appointed from the private sector. In the Morrisonian theory, boards were to be very autonomous; intervention from Parliament, ministers and the bureaucracy was to be kept to a bare minimum.

The Morrisonian public corporation was to be financially self-sustaining deriving financing from

government-owned equity, earnings and, when necessary, loans from the capital markets. The corporation was to devise and implement its financial and other plans "at arms' length" from the government, requiring no approval of the minister, Parliament or the treasury of its operating and capital expenditures. The corporation would keep its own accounts. Its statements of accounts and financial transactions would be audited by independent auditors.

The employees of the corporation would not be public servants and would fall outside the general personnel controls applying to the public service.

Each corporation would report as required to the minister and on an annual basis to Parliament. Neither the minister nor Parliament would have the authority to issue specific directions to the board, nor to intervene in or scrutinize the internal operations of the corporation, unless significant management problems or deficiencies were to come to light.

The Morrisonian model is obviously an abstraction. Few public enterprises like it have ever existed and probably few ever will. Even those public corporations established (through nationalization or otherwise) by Lord Morrison himself departed in several significant respects from his own model.

The Morrisonian quest for autonomy for public corporations was based on the assumption that boards of directors would automatically be aware of and gladly implement public policy objectives without being prompted. Experience soon showed that assumption to be faulty and many of the corporations established by Morrison himself were subject to significant powers of government control and direction.

More germane to the point, however, Canadian experience has shown no great fidelity to the Morrisonian abstraction. To begin with, Canada has been one of the very few jurisdictions to use the government-owned corporation for other than business or commercial functions. Several Canadian Crown corporations are really departments with corporate form. Several other Crown corporations fulfill regulatory and administrative roles.¹ Corporate form in such instances serves objectives other than being a structure uniquely adapted to business and commercial undertakings.² Consequently, their structures and relationship to government vary significantly from the Morrisonian model designed essentially for business or commercial undertakings.

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1. This, in large part, accounts for the fact that the federal government has found it necessary to categorize the several types of Crown corporations in the Schedules to the *Financial Administration Act*.
 2. For example, the legal authority to acquire, hold and dispose of property, the ability to sue and be sued in its own corporate name.

History of the Evolution of the Crown Corporation¹

Of the Crown corporations now in existence under their original names and structures, the oldest is the National Battlefields Commission, if one does not include the individual corporations established to administer harbour facilities across Canada between 1852 and 1936.² The National Battlefields Commission was established by a special act of Parliament in 1908 to restore and preserve historic battlefields in the Province of Quebec. At its inception, it looked very much like an organization that later would be called joint or even a mixed enterprise. It was to be financed by contributions, not only from the federal government, but also from provincial governments, the Government of the United Kingdom, governments of the colonies and private individuals. This was part of the reason the corporate, rather than the departmental form of administration was chosen. In addition it was hoped that

"..all shades of opinion in this country,
all possible views shall be represented
(in this Commission) "³,

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1. Taken from the Government's proposals on the Control, Direction and Accountability of Crown Corporations, (August 1977), p.p. 11-13.
 2. The National Battlefields Commission (1908) is the earliest Crown corporation still functioning under its original name. However, the Ottawa Improvement Commission, which became the Federal District Commission and later the National Capital Commission, was established in 1899.
 3. Sir Wilfrid Laurier, Debates of the House of Commons, 1907-8, Vol. III, p. 4378. See the several interventions by Mr. Foster, M.P., *Ibid.*, p.p. 4379-4381. Members of Parliament in 1908 were as concerned as their present-day colleagues about putting public money at the disposal of an independent commission to be administered outside of the scope of day-to-day parliamentary scrutiny and control.

and, accordingly, the act provided for a board of directors representing other than solely the interests of the federal government.

Similarly, prior to 1936, seven harbour commissions had been incorporated by special acts of Parliament to administer local harbours. Each commission was independent of the others and the commissions were chosen locally.

Both the Battlefields Commission and the harbours commissions were, therefore, illustrations of two classic functions of the corporate form of government organization. First, corporate form was required because each organization needed the ability to acquire, hold and dispose of property and sue and be sued in its own name. Second, each organization needed a plural management structure (i.e. a board or commission) so that varied or local interests could be represented.

The harbours commissions and the Battlefields Commission were administrative organizations. The first entrepreneurial Crown-owned company - meaning a company that provided goods or services in a competitive market, or on a financially self-sustaining basis - was Canadian National Railways (CNR).

The federal government's ownership of CNR originated from its deep involvement in the promotion

and financing and, to a certain extent, its regulation of railroads prior to 1919. As a consequence of government financial support, although the three national railroads which were to be brought together under the umbrella of the CNR were nominally in private hands, the common stock held by the private sector represented a minimal cash investment and the financial responsibility for the railroads rested largely with the federal government and certain provincial governments. With the impending bankruptcy of the three railroads the federal government was forced to take them over to protect the government's investment and Canada's credit in the foreign capital markets. Given the progression of government financial involvement in the railroads, their amalgamation into one government-owned entity could be seen as a further evolution, not a radical departure from past policies and institutions.

After the CNR, the next major venture into public enterprise through a federally-owned company was the establishment of the Canadian Broadcasting Corporation (CBC) in 1932. Known originally as the Canadian Radio Broadcasting Commission (CRBC), it performed functions of both a regulatory and service nature. The essential purpose in establishing the CRBC was to provide a vehicle by which Canadians could have access to radio broadcasting originating in Canada and thereby promote a national identity. It was feared

that if a Canadian controlled broadcasting and regulatory entity were not established, Canadian broadcasting would become dominated by broadcasts originating in the United States. Because of the relatively small size of the Canadian radio market stretched across an enormous country, the private sector was unwilling to provide the required capital investment. Consequently, the federal government moved into the field through the establishment of the CBC.

By the outbreak of war in 1939 there were in existence fifteen Crown-owned companies in the rail, ship and air transportation, financing and credit, harbour administration and commodity marketing fields.¹

The most rapid growth in the establishment of Crown corporations was to come during the second World

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1. Bank of Canada, (1934)
 Canadian Broadcasting Corporation, originally
 the Canadian Radio Broadcasting Commission, (1932)
 Canadian Farm Loan Board, (1929)
 Canadian National Railways, (1919)
 Canadian National (West Indies) Steamship Ltd., (1929)
 Canadian Wheat Board (1935)
 Central Mortgage Corporation
 Director of Soldier Settlement, a corporation sole
 (1919)
 Federal District Commission, originally the Ottawa
 Improvement Commission, (1927)
 Halifax Relief Commission, (1918)
 National Battlefields Commission, (1908)
 National Gallery of Canada, (1913)
 National Harbours Board, (1936)
 National Research Council, (1917)
 Trans-Canada Air Lines, later known as Air Canada, (1937)

War. The exigencies of that War demanded that the Government of Canada resort increasingly to an organizational form that could operate largely entrepreneurial activities and without the personnel and budgetary constraints of normal departmental administration. In establishing Crown companies to assist in the war effort the government was also using an organizational form that would attract and be familiar to businessmen drawn from the private sector to assist in the management of essential war programs. For these reasons thirty-three Crown companies were established, four by letters patent under the *Canada Companies Act*¹ pursuant to the authority vested with the government by the *War Measures Act* and twenty-eight² by the Minister of Munitions

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1. Community Prices Stabilization Board, Eldorado Mining and Refining Limited, Wartime Salvage Limited, Wartime Food Corporation.
 2. Aero Timber Products Limited, Allied War Supplies Corporation, Atlas Plant Extension Limited, Canadian Wool Board, Commodity Prices Stabilization Corporation, Citadel Merchandising Company, Cutting Tools and Gauges Limited, Defence Communications Limited, Eldorado Mining and Refining Limited (now Eldorado Nuclear Limited), Fairmount Company Limited, Federal Aircraft Limited, Machinery Service Limited, Melbourne Merchandising Limited, National Railways Munitions Limited, Northwest Purchasing Limited, Polymer Corporation Limited (now Polysar Limited), Park Steamship Company Limited, Plateau Company Limited, Quebec Shipyards Limited, Research Enterprises Limited, Small Arms Limited, Toronto Shipbuilding Company Limited, Turbo Research Limited, Veneer Log Supply Limited, Victory Aircraft Limited, War Supplies Limited, Wartime Housing Limited, Wartime Merchant Shipping Limited, Wartime Metals Corporation, Wartime Oils Limited, Wartime Salvage Limited, Wartime Food Corporation.

and Supply under the *Canada Companies Act* pursuant to the *Department of Munitions and Supply Act*.¹

A large number of the wartime Crown companies were wound-up with the end of the hostilities. Many continued, however, and their number was augmented by additional companies established during the reconstruction period after the War. By 1951, there were thirty-three Crown-owned companies in operation.

Owing to the speed with which Crown companies were created and as a result of the host of different purposes for which they were established, the government had not defined either standard models for their creation, or standard mechanisms by which the ministry, individual ministers or Parliament could exert effective control and direction over them and ensure adequate accountability from them. Accountability of Crown companies to Parliament was especially weak even though, in many cases, they were incorporated by Parliament or incorporated pursuant to parliamentary authority for the achievement of public

1. Upon the outbreak of the war the Department of Munitions and Supply was established under the *Department of Munitions and Supply Act*. The *Act* granted extensive powers to the Minister to provide supplies and munitions related to the war effort and for carrying out defence projects. The *Act* was very quickly amended (1940) to authorize the Minister to incorporate companies under the *Canada Companies Act*, and under equivalent provincial legislation. Once a corporation was established in this way, the Minister could delegate any of the powers and duties conferred upon him by the *Act* to the corporation. The Minister of Munitions and Supply throughout the war (April 1940 - Dec. 21, 1945) was C. D. Howe and the wartime corporations established by him became known as the "C.D.Howe corporations".

policy objectives. Crown companies could avoid parliamentary scrutiny indefinitely as long as they did not require parliamentary appropriations to finance operations. Few even submitted annual reports on a regular basis to Parliament. In such cases the corporations reported only to the minister and, in practice, were accountable only to him.

It was in response to this situation that in 1950 the government tabled in Parliament a Bill which, once approved, became the *Financial Administration Act*.¹ Part VIII of the *Financial Administration Act* was intended to lay the foundation for a more uniform and systematic financial management and control relationship between the ministry and Crown corporations on the one hand and the ministry and Parliament on the other. Further the *Financial Administration Act* coined the term "Crown corporation" and, through section 66, defined it to mean

"... a corporation that is ultimately accountable, through a Minister to Parliament for the conduct of its affairs, and includes the corporations listed in Schedule B, Schedule C and Schedule D"

The Schedules appended to the *Act* listed a total of 22 corporations² that pursuant to subsection 66(3) were

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1. *Financial Administration Act*, 1951 (2nd Session), Revised Statutes, 1952, chapter 116.
 2. Ten Schedule B corporations, 11 Schedule C and 12 Schedule D. (There were at the time a total of 21 departments.)

divided into three groups.

All corporations that were agents or servants of Her Majesty in right of Canada and were responsible for

"..administrative, supervisory or regulatory services of a governmental nature;"¹

were listed in Schedule B to the *Act* and known as "departmental corporations". Under the *Financial Administration Act* these corporations were treated exactly like departments ² and were to be under the more or less continuous direction and control of a minister. The concept of the *Act* was that Schedule B corporations, with respect to financial control, were really simply departments of government with corporate form.

All corporations that were

"..responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public," and

..."ordinarily required to conduct... operations without appropriations"³

1. *Financial Administration Act*, *op cit.* ss.76(3)(a)

2. *Ibid*, ss. 78(2)

3. *Ibid*, ss. 76(3)(c).

were listed in Schedule D and known as proprietary corporations. Many of the original Schedule D corporations operated in a monopolistic or oligopolistic market-place. Revenues from consumers of goods and services were expected to cover at least operating costs.

Between Schedules B and D were the corporations listed in Schedule C and known as "agency corporations". All such corporations were stated to be agents of Her Majesty and were responsible for

"...the management of trading or service operations on a quasi-commercial basis, or for the management of procurement, construction or disposal activities on behalf of Her Majesty in right of Canada;"¹

Even in their original form, however, the Schedules to the *Financial Administration Act* did not conform precisely to the definitions of Schedules B, C and D provided by subsection 66(3). For example, under the criteria established by subsection 66(3), the Canadian Broadcasting Corporation should probably have been listed in Schedule C, or even Schedule B. The CBC, however, was quite deliberately placed in Schedule D to isolate it as much as possible from political interference and control.

1. *Ibid*, ss. 76(3)(b).

In recognition of the number of combinations and permutations in types and mandates of Crown corporations the *Financial Administration Act* specified that in the event of an inconsistency between the *Act* and the special act of incorporation of a particular Crown corporation, the particular act would apply.¹ The government and Parliament could accordingly adapt the regime of control, direction and accountability to the circumstances and requirements of individual corporations where necessary. The *Financial Administration Act*, however, would be the standard against which any variations would be judged.

Even with the flexibility built into the *Financial Administration Act*, the government decided not to bring all "Crown corporations" under the Act's authority. The Canadian Wheat Board, for example, was not listed in the Schedules to the *Act* on the grounds that the financial management and control regime established by Part VIII was unsuited to the particular requirements of the corporation.

The basic philosophical foundation of Part VIII was that ministers, as publicly accountable individuals must generally oversee the expenditure of public funds by Crown corporations. Secondly, the ministry, on behalf of the Crown, would continue the exercise of the powers of direction and control over Crown corporations provided by statute or required of

1. *Ibid*, ss. 78(1).

it in its capacity as trustee shareholder.¹ The ministry would be accountable to Parliament for that exercise. In addition, Part VIII provided the means whereby Parliament could be more fully informed of the activities and operations of Crown corporations, regardless of their requirements for public financing, and thereby be in a much better position to hold the corporations and the ministry to account for their respective actions. The major innovations *vis-à-vis* accountability to Parliament in Part VIII were the requirements that each corporation, regardless of its financial position, must table its capital budget (after approval by the Governor in Council) and annual reports, complete with financial statements,² before Parliament.

In order to keep the statutory regime as flexible as possible, the specific requirements of Crown corporations under Part VIII and the particular objective Part VIII was meant to achieve were seldom specified in a detailed fashion. Part VIII, however,

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1. As has been already noted the majority of Crown corporations established during wartime (1939-1945) were established under companies legislation rather than a special act of Parliament. The minister was, therefore, the trustee shareholder. His powers and duties with respect to the corporation were those of the shareholder under companies law. Part VIII of the *Financial Administration Act* implicitly and explicitly reaffirmed the minister and ministry as the repository of the "shareholder's prerogatives.
 2. For a detailed discussion of the provisions of Part VIII of the *Financial Administration Act* see Herbert R. Balls, "The Financial Control and Accountability of Canadian Crown Corporations", Public Administration Summer, 1953, pp. 133-134.

was drafted in close consultation with the existing Crown corporations and the accounting community and, as a result, it appears that all participants fully understood their requirements under the legislation and its objectives. Quaint as it may seem today, the effectiveness of Part VIII was based at least in part on trust, mutual understanding of objectives and personal relationships. For example, while the *Act* did require the Governor in Council to approve capital budgets, it did not indicate the effect of that approval. It was assumed, at the time, that Crown corporations would not depart significantly from a capital budget approved by the Governor in Council without first consulting with and obtaining the approval of government officials and ministers.¹ It was also assumed that corporations would respond positively and quickly to requests from the Government for additional information or for the presentation of information in a different format, even when such requests had no statutory authority.

Another important element of control and accountability provided for in the new *Financial Administration Act* was the provisions related to

1. For a few years after Part VIII of the *Financial Administration Act* came into effect, the orders in council which approved capital budgets under subsection 80(2) (now sub-section 70(2)) often indicated that approval of the budget included approval to overspend on individual items by a certain stated percentage (e.g. 5%, 10%) provided that the total budget was not thus exceeded. Consequently, there were a number of revised budgets submitted by Crown corporations in anticipation of original budgets being exceeded. Formal constraints were, therefore, imposed by individual orders in council rather than the legislation itself. For reasons which cannot now be ascertained, this practice lapsed in the late 1950's and was never resuscitated.

audit requirements for Crown corporations. In the first place the *Act* regulated the appointment of auditors to Crown corporations.¹ If an auditor was not named by the special act or pursuant to that act not appointed by a minister or the Governor in Council, an auditor was to be appointed by the Governor in Council. In addition and of more importance were the uniform and detailed audit requirements imposed by section 87. Incidentally, the accounting profession found these requirements too stringent at the time and the requirements were inserted in the Bill over the profession's protestations.²

Between 1951 and 1978, the number of Crown corporations listed in the Schedules roughly doubled; the size and complexity of their operations, like that of the government generally, increased by leaps and bounds; and the nature of the activities of some of the newer Crown corporations was frequently quite different from anything contemplated in 1950. Under such pressure, three fundamental flaws began to appear in Part VIII.

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1. S.s. 77(1), *Financial Administration Act*, *op cit*.
 2. Sections 87 and 88 of the *Act* were drafted to make it clear that the auditor, be he the Auditor General or private auditor, audited the accounts and financial transactions of Crown corporations on behalf of both Parliament and the ministry. However, the position of the ministry as "shareholder" or "owner" was emphasized by the *FAA* stipulating that auditor's reports other than annual reports were to be made to the minister. Discretion was left with the minister as to whether or not these latter reports would be made available to Parliament.

First the assumption of a relationship built largely on trust, mutual understanding and personal relationships proved to be faulty, and progressively so as the years advanced. It was not that either the government or Crown corporations proved to be untrustworthy, it was simply that, with the turnover of individuals on both sides, the standards and objective of the controls enumerated in Part VIII came to be interpreted differently by either side due to the inexplicit wording of the *Act*. Because of the increasing size and complexity of government, furthermore, personal relationships could no longer play the important part they once did.¹ As a consequence, the standards and procedures of control, direction and accountability envisaged by the drafters of Part VIII began to erode.

Secondly, although Part VIII allowed for the primacy of the special act of incorporation in the event of an inconsistency between it and Part VIII of the *FAA*, Part VIII was intended to be the standard for financial control, direction and accountability to which individual special acts would progressively be amended to conform, unless there were compelling reasons in individual cases to dictate otherwise. In fact, over time the opposite occurred. Exceptions to Part VIII became the rule and significant and unjustified inconsistencies began to develop in the

1. H.R.Balls as Director, Financial Administration and Accounting Policy Division, Department of Finance, indicates that he personally knew most of the heads of Crown corporations and met with them frequently - something that would be practically impossible in today's circumstances.

government's control and direction of Crown corporations and their accountability to Parliament. Finally, Part VIII applied explicitly only to those Crown corporations that were listed in Schedules B, C or D to the *Financial Administration Act* - if a corporation was not listed, Part VIII did not apply. In 1950 only a small hand-full of corporations were not listed in the Schedules. By 1978 a total of 25 corporations, wholly-owned by Her Majesty in right of Canada, were not listed in the Schedules. In addition, very few of the 100-odd wholly-owned subsidiaries of Crown corporations were listed in the Schedules. Consequently, the scope of authority of Part VIII covered only a fraction of the existing "Crown corporations".

As a consequence, by the early 1970's ministers and Parliament had developed serious reservations about the financial management and control of Crown corporations in general and several Crown corporations in particular.

Another flaw began to appear in the government's relationship with Crown corporations which had a significant impact in their overall control, direction and accountability.

It is important to note that Part VIII of the *Financial Administration Act* addressed itself only to issues of financial direction, control and accountability. Policy direction, control and accountability were to have been achieved through the financial management and control mechanisms it provided. Any erosion in

the effectiveness of the financial controls and accountability, therefore, led to an erosion of policy control, direction and accountability. Furthermore, with experience it was discovered that the use of Part VIII to achieve policy direction, control and accountability gave rise to less than optimal results because as financial mechanisms of direction and control they were unsuited for use even as indirect mechanisms of policy control.¹ Consequently, by the early 1970's ministers were also expressing grave reservations about many Crown corporations being fully effective in the implementation of national policy objectives.

The cause of this situation rests not only with Part VIII of the *Financial Administration Act*. First, Part VIII as drafted in 1950, was based on the Morrisonian concept of public enterprises: that simply by existing as a state-owned entity, public enterprises could achieve public policy objectives and there was no need for continuous policy control by the ministry. There is compelling evidence that by the 1970's the perception of Crown corporations by both ministers and Parliament has evolved far beyond the Morrisonian concept to a view that public enterprises are instrumental in the achievement of public policy objectives as enunciated from time to time by the government and Parliament. Consequently,

1. For example, a government might consider refusing to approve a budget until a corporation had acquiesced in the achievement of certain policy objectives. Were this to occur, however, the financial stability of the corporation could be jeopardized for many years to come.

mechanisms of policy control, direction and accountability more sophisticated than those provided by Part VIII would be required. In addition, Parliament has more and more pressed ministers to intervene in the affairs of Crown corporations to correct management errors and give policy direction.¹ The mechanisms provided by Part VIII have proven to have a number of inherent deficiencies in this regard.

Second, prior to the early 1960's the Department of Finance (both in its own right and as the secretariat to the Treasury Board) and the individual appropriate ministers were the focal points in the control and direction of Crown corporations under the *Financial Administration Act*, with the Department of Finance probably taking the lead role. The emergence of the Treasury Board Secretariat as a department separate from Finance² and the further division of

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1. See, for example, the Public Accounts Committee's so-called "Polysar Report," 2nd Report Standing Committee Polysar Report dated July 7, 1977; Crown Corporations Report, 3rd Session, 30th Parliament, 2nd Report, The Crown Corporations Report of the Standing Committee on Public Accounts dated April 12, 1978; and AECL Report (1st Session, Standing Committee on Public Accounts, AECL Report dated February 27, 1978) and the Auditor General's 1976 and 1977 Annual Reports.
 2. The creation of the Secretariat as a separate department arose from recommendations in the Royal Commission on Government Organization (Glassco) in 1963. Although the Secretariat, as we now know it, was established in 1966, it evolved by stages from the Department of Finance. See J. R. Mallory, The Structure of Canadian Government, Macmillan of Canada (Toronto, 1971), p.129 and J. E. Hodgetts, The Canadian Public Service, *op cit* p.p. 260-262. Incidentally, Part VIII of the *Financial Administration Act* was amended in 1967 to give statutory effect and recognition to the role of the President of the Treasury Board regarding Crown Corporations.

responsibilities for Crown corporations between the two led to a dilution of the leadership role previously played by Finance and possibly led as well to some uncertainty respecting the division of responsibilities for Crown corporations between the new Treasury Board Secretariat and the Department of Finance.

This new division of responsibility for Crown corporations has become, in the minds of some at least, a fragmentation of responsibility within the government for Crown corporations. At any particular point in time a Crown corporation may be subject to some form of direction and control by or accountability to, not only the appropriate minister and his department, the Department of Finance and the Treasury Board Secretariat, but also the Department of Justice, the Privy Council Office, the Office of the Comptroller General and any other department that might wish to make its influence felt on any particular issue.

It was the cumulative effect of these factors that led, in 1977, to the Government's publication of a series of proposals on the control, direction and accountability of Crown corporations.

The Government's General Approach¹

The government's general approach to Crown corporations, as illustrated by the proposals, implicitly and explicitly rejects both the traditional Morrisonian concept of public enterprise as well as any suggestion that Crown corporations are simply corporations that "happen" to be owned by the Government of Canada.

In the first place, it is the Government's firm and clear position that Crown corporations are instrumental in the achievement of public policy objectives as specified by the government and Parliament. Accordingly, Crown corporations cannot be left alone to manage their affairs subject only to periodic checks of financial performance and probity. Means must exist whereby the government may communicate and ensure the implementation of public policy objectives.

Since Crown corporations are instrumental in the achievement of policy objectives, the individual minister responsible for a particular policy sector (e.g. energy, transport) must continue to be the focus of responsibility for the exercise of the ministry's powers with respect to them. Consequently, an underlying objective of the Government's proposals has been to strengthen the role of the individual ministers accountable to Parliament for Crown corporations.

1. As illustrated in the 1977 publication on the "Control, Direction and Accountability of Crown corporations".

More importantly, however, the Government rejects the notion that Crown corporations are really no different from private sector corporations, except that the Government of Canada is the sole shareholder or owner. The private sector corporation is an institution uniquely adapted to the maximization of profit and the distribution of that profit to the investors (i.e. the shareholders). Indeed, Canadian corporation law has developed to the point where a director or officer of a corporation who departs from single-minded profit seeking is at considerable risk *vis-à-vis* the shareholders.¹

In the public sector, it is not the principal role of a Crown corporation to maximize profit. Indeed, the majority of Crown corporations are responsible for undertakings of a research, advisory, regulatory or administrative nature for which the profit motive simply does not apply. Even for those Crown corporations that are involved in undertakings that involve selling goods and services to the public on a commercial or quasi-commercial basis, the maximization of profit cannot detract from the primary purpose of the corporation which is to implement public policy objectives regardless of their "profitability". For this reason it is both improper and unfair to judge Crown corporations on the basis of their "bottom lines". Crown corporations are expected to be efficient, of that there is no doubt, but efficiency cannot be measured solely on the basis of "profitability".

1. Frank Iacobucci, Marilyn L. Pilkington, J. Robert S. Pritchard, Canadian Business Corporations, Agincourt Canada Law Book Limited, 1977, p. 297.

Secondly, the history of the evolution of the corporation from the mid-nineteenth century in the United Kingdom, illustrates a quest to establish a "corporate veil" - the concept of limited liability. Since passage of an amendment to the U.K. *Companies Act* (August, 1855)¹ the liability of shareholders for the actions of their corporations has been limited, thus allowing those same shareholders to escape the potentially onerous burden of personal liability should the affairs of the company go awry.

In the case of the majority of Crown corporations the "corporate veil" is greatly diluted. The majority of Crown corporations are constituted as "agents of Her Majesty" and, therefore, enjoy many of the privileges and immunities of the Crown. More importantly, in this context, however, is the fact that under section 45 of the *Financial Administration Act*, the borrowings of a Crown corporation *qua* agent are a charge on ... the Consolidated Revenue Fund". In other words, should a Crown corporation default on a loan from private sources, the auditors have a direct recourse to the Consolidated Revenue Fund.²

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1. 18 and 19 Victoria, Chapter 133. The concept of limited liability under this *Act* was restricted to the shareholders of registered company. The first U.K. "company registration" statute was the *Joint Stock Companies Act* of 1844, which conferred corporate personality on a registered company, thereby disposing of the difficulties in obtaining remedies against corporations which lack of personality had led to.
 2. See the subsequent section on "Agent of Her Majesty status" for a detailed discussion.

In the private sector, under corporation law, a corporation is a fictitious legal entity separate and distinct from the shareholders and its legal rights and duties are distinct from those of the shareholders. However, if it can be proved that a company acted as an agent for a person or group of persons - even for shareholders - then the law attaches to that person or persons - even shareholders - the consequences of that action. Given that most Crown corporations are agents of Her Majesty, the Government cannot escape responsibility and liability for their actions when those actions are challenged or their affairs go awry.

Apart from the fact that all are corporations owned by the Crown, Crown corporations vary substantially in terms of mandate, size, structure, financing and competitive position (many, of course, do not "compete" at all, or merchandize goods and services). While there are certain requirements or principles that can be applied uniformly across the spectrum of Crown corporations, the Government's general approach is based on the necessity of providing sufficient flexibility, so that the mechanisms of control, direction and accountability may be adapted to the particular circumstances and requirements of Crown corporations where they arise.

In meeting this objective, the Government has proposed the establishment of what amounts to a general framework of control, direction and accountability within which all Crown corporations are to operate and, a "minimum floor" of requirements¹ that apply to all

1. Such as the requirement for Governor in Council approval of the acquisition or establishment of subsidiaries, the regime of duties, responsibilities and liabilities established by the *Canada Business Corporations Act*, the requirement for government approval prior to raising financing in the capital markets.

Crown corporations regardless of the nature of their undertaking, the mode of financing or their relative independence from government.

Within the general framework and in addition to the "minimum floor" the Government's proposals contemplate a wide number of standards and requirements that could be imposed on individual corporations or groups of corporations as circumstances required. The effective operation of the entire proposed policy, accordingly, hinges on the exercise by the Government of fairly wide powers of discretion vested with the Government by Parliament.

The Government, through its proposals, has not only implicitly accepted, but also reinforced, the philosophical foundation of Part VIII of the existing *Financial Administration Act*, namely that the corporations themselves will be responsible for day-to-day administration within a policy framework that may be enunciated by the Government and Parliament. The ministry on the other hand may exercise powers of direction and control as befits the owner or shareholder and major source of financing. Parliament will hold the corporations and the ministry to account for the exercise of their respective duties.

With respect to the role of Parliament, the Government fully recognizes that the quality and integrity

of information provided to Parliament has been generally insufficient to allow it to hold the ministry and the corporations to account effectively. Consequently, a major thrust of the Government's proposals is to upgrade the information provided to Parliament through improvements in the form of and information contained in annual budgets and reports; providing full information with respect to the borrowings of Crown corporations and ensuring that operating budgets, when they entail substantial appropriations, are tabled in Parliament.

Finally, the lines of accountability of Crown corporations have often been unclear in the past. Crown corporations have appeared to be accountable to many individuals and institutions and, it has been said that as a consequence of this dispersion of accountability, Crown corporations have, in effect, been less accountable than both the Government and Parliament have wished. The Government's proposals, as a result, have tried to establish that for which boards of directors are responsible and accountable, and that for which the ministry and the appropriate minister are responsible and accountable. This then defines their respective accountability to Parliament.

Having established the fundamental philosophical position and objectives of the Government's proposals, this paper turns to a discussion of several important elements of the basic structure of Crown corporations as well as certain important factors in their relationship with the Government as set out in the Government's proposals.

Crown Corporations and the Ministry

As has been discussed at several points in this paper, the ministry's powers, duties and responsibilities with respect to Crown corporations (as with other non-departmental bodies) has been established by various general or specific statutes and the ministry, through the responsible minister, is accountable to Parliament for the exercise of those powers, duties and responsibilities.

It is worth restating here the elements of ministerial responsibility for non-departmental bodies refined in relation to Crown corporations. Ministerial responsibility for Crown corporations consists of four major elements.

First, ministers have the right to instruct Crown corporations as to the public policy objectives the corporations are to pursue within the objects and powers of the corporations and their mandates as defined by Parliament. In the absence of instructions or directions from ministers, boards of directors have the residuary responsibility to do whatever they feel is necessary to fulfill the requirements of the special act of incorporation or the relevant companies legislation and the by-laws.

Second, ministers are responsible for the expenditure and commitment of public funds and that responsibility comes into play with respect to those corporations that spend public money.

Third, ministers are responsible for intervening in the affairs of any Crown corporation in order to correct any management errors or omissions of significance that come to their attention.

Fourth, ministers are responsible for the exercise of a wide range of powers and authorities that are provided by individual acts of incorporation or by general companies legislation.

Traditionally, ministerial responsibility for Crown corporations has been muted. In response to recent events, however, Parliament and the public generally have seemed to impose on ministers a greater degree of responsibility and accountability.

The ministry's major powers *vis-à-vis* Crown corporations relate to the appointment or election of directors, the appointment or the approval of the boards' appointment of chairmen and presidents, the approval of operating and capital budgets and, where the statutory power to do so exists, the issue of directions.

If a Crown corporation has been established by a special act of incorporation, as a general rule it is the Governor in Council who appoints directors and who appoints or approves the appointment of chairmen and presidents. If a Crown corporation has been established under companies legislation, the election of directors and the approval of the appointment of senior officers is the prerogative of the appropriate minister in his capacity as trustee shareholder. The appropriate

minister will, by virtue of a Cabinet directive to this effect, always consult with his colleagues in Cabinet prior to the exercise of this prerogative.

Under the *Financial Administration Act* capital budgets are to be approved by the Governor in Council on the recommendation of the Minister of Finance, the President of the Treasury Board and the appropriate minister. Operating budgets require the approval of the appropriate minister and the President of the Treasury Board.

It is important to note, at this point, that the ministry is not only what might be called the "owner" or "shareholder" of Crown corporations, it is also the banker, as it were, by virtue of the fact that most Crown corporations rely on parliamentary appropriations or loans from the Consolidated Revenue Fund for financing. Even those corporations that raise financing in the capital markets often do so with a government guarantee or as agents of Her Majesty.¹ Consequently, the government is entitled to information and controls which a lending institution would expect in the private sector, in addition to that information and the powers of direction and control the government expects to receive in its capacity as "owner" or "shareholder".

1. Only Canadian National (CNR) has gone to the capital markets without a government guarantee and as a non-agent. A discussion of agent of Her Majesty status follows in the subsequent section.

As was discussed in the General Introduction to this paper, the individual responsible minister is, with respect to a few Crown corporations, the "trustee shareholder", the true or ultimate shareholder being the Crown. Obviously, since only a minority of Crown corporations have a share structure, there can be a trustee shareholder for only that minority of corporations. However, although the minister may exercise certain powers *vis-à-vis* a Crown corporation as a shareholder, those powers are to varying degrees quite different from the shareholder's powers in the private sector and also vary substantially between two groups of Crown corporations.

The first group of corporations are those incorporated by a special act of Parliament. With respect to this group, even though the minister is the "trustee shareholder" his duties and responsibilities are specified by the special act and are no more and no less than those specified in the special act.

If not incorporated by a special act of Parliament, a Crown corporation must have been incorporated under companies legislation.¹ For this second group of corporations the minister, as trustee shareholder, exercises certain formal powers, duties and responsibilities

1. Such as the *Canada Business Corporations Act* or its predecessor the *Canada Corporations Act* and the *Canada Companies Act*. Parliamentary authority has usually been required to authorize a minister to incorporate a company in this way and hold the shares. It is the policy of the present Government that explicit statutory authority must either exist or be obtained.

which devolve to him pursuant to the general companies legislation or the corporate by-laws. In essence those powers, duties and responsibilities are identical to those of the shareholder in the private sector and relate to the election of directors, approval of corporate by-laws and approval of the board's nominations for the chairman and president.

Regardless of the powers vested in the minister by the special act of incorporation or as a result of being the shareholder, where there is no conflict the provisions of Part VIII of the *Financial Administration Act* apply. Part VIII adds substantially to the powers of direction and control vested with the minister and ministry.

Agent of Her Majesty Status

All but seven¹ of the Crown corporations listed on the present Schedules to the *Financial Administration Act* are agents of Her Majesty in right of Canada. Several Crown corporations that are not listed on the Schedules to the *Financial Administration Act* are constituted as agents of Her Majesty in right of Canada as well.

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1. CNR, Air Canada and the four Pilotage Authorities are declared not to be agents of Her Majesty. The contract between the Government of Canada and VIA Rail Canada Inc., states that VIA Rail is not an agent of Her Majesty.

Crown corporations become agents of Her Majesty in any one of the following ways:

- i) Designation as an agent of Her Majesty by Parliament through the special Act of incorporation. In such instances one usually finds an agency clause which generally reads as follows:

"..the Corporation is for all purposes an agent of Her Majesty, and its powers under this Act may be exercised only as an agent of Her Majesty."

- ii) Several statutes authorize a minister or the Governor in Council to establish corporations for certain purposes. Several of these statutes, such as the *Atomic Energy Control Act*, declare that any corporation thus established is an agent of Her Majesty for all purposes.
- iii) The *Government Companies Operation Act* authorizes the Governor in Council, by proclamation, to constitute as an agent a company established under Part I of the *Canada Corporations Act* or the *Canada Business Corporations Act* which is wholly-owned by Her Majesty in right of Canada.

Quite apart from the above means whereby corporations become agents of Her Majesty in right of Canada, a particular Crown corporation may act as an agent or be deemed to be acting as an agent under certain circumstances.

Agent of Her Majesty status has a number of significant implications for those Crown corporations that are so constituted.

As a general rule, agent of Her Majesty status extends certain of the privileges and immunities of the Crown to the corporations thus constituted. More specifically in the field of labour relations, a Crown corporation *qua* agent of Her Majesty must fall under the authority of either the *Canada Labour Code* (Part V) or the *Public Service Staff Relations Act*. Under section 125 of the *British North America Act*, land and property belonging to Her Majesty (including those of agents) is exempt from taxation within the scope and extent of that section. Similarly, to the degree that provincial legislation is not binding on Her Majesty in right of Canada, it would not be binding on Crown corporations constituted as agents of Her Majesty in right of Canada. Under section 16 of the *Interpretation Act* Crown corporations *qua* agents are immune from the application of statutes that do not expressly bind the Crown. Crown corporations as agents may be sued before the Courts, but are immune from the execution of any judgment made against them.

The most significant implications of agent of Her Majesty status come into play when Crown corporations raise their financing from the private capital markets.

Section 45 of the *Financial Administration Act* now reads as follows:

"The payment of all money borrowed and interest thereon and of the principal of and interest on all securities issued by or on behalf of Her Majesty with the authority of Parliament¹ is a charge on and payable out of the Consolidated Revenue Fund R.S., c.116, s.50." (Emphasis added. The prevailing view of the Department of Justice is that the underlined phrase extends the coverage of section 45 to Crown corporations constituted as agents of Her Majesty.)

Given the debt-equity ratio of most Crown corporations that are agents, together with their general financial performance, it is largely as a result of section

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1. Parliamentary authority may be provided in individual instances through Estimates or more frequently, through the special act of incorporation where Parliament confers a general borrowing authority on a corporation usually up to a certain specified limit. For example, Parliament recently increased the authorized capital of the Export Development Corporation from \$400 million to \$1 billion, plus \$25 million in capital surplus. Since the *Export Development Corporation Act* limits borrowings of the Corporation to ten times the aggregate of authorized capital and the amount credited to capital surplus, this had the effect of increasing EDC's borrowing ceiling from \$4.25 billion to \$10.250 billion.

45 that they are able to raise long-term financing from the capital markets. Accordingly, section 45 or an interpretation of its meaning is, from time to time, found in Crown corporations' prospectus statements. One of the larger Crown corporations, for example, in a recent issue on the United States bond market using section 45 as its authority, stated on the front page of its prospectus that the notes of the corporation

"...will constitute direct obligations of Her Majesty in right of Canada. Payment of the principal and interest on the Notes will be a charge on and payable out of the Consolidated Revenue Fund."

In the view of a number of financial houses it was this corporation's status as an agent of Her Majesty that allowed its securities to obtain a triple-A rating from the United States bond rating services and the corporation traded on the market as a "sovereign". Further, the yield from the five-year corporate securities was almost exactly the same as the yield demanded by the market on five-year securities of the Government of Canada. In other words, the corporation's securities were treated by lenders as virtually the same as securities of the federal government.

Pursuant to section 40 of the *Financial Administration Act*,

"An annual statement of all borrowing transactions on behalf of Her Majesty shall be included in the Public Accounts."

While section 45 of the *Financial Administration Act* establishes that the borrowings of Crown corporations are a direct liability against the Consolidated Revenue Fund, the Public Accounts record such borrowings (along with the borrowings of certain non-agent Crown corporations with a Government guarantee) as contingent liabilities.¹ What, at first glance might appear to be an inconsistency has a logical explanation.

The Public Accounts records the assets, liabilities, revenues and expenditures of the Government of Canada accounting entity and this entity excludes the Crown corporations listed in Schedules C and D to the *Financial Administration Act* and those that are not listed in any Schedule to the *Financial Administration Act*. The latter are recorded as "non-consolidated" entities of the Government of Canada accounting entity and their liabilities, including their borrowings in the capital markets, are shown as contingent liabilities. (Statements of the assets, liabilities, revenues and expenses of individual Crown corporations appear in Volume III of the Public Accounts).

Were the liabilities of agent Crown corporations to be included in the statement of liabilities of the Government of Canada, the assets of these corporations would have to be included in the statement of assets as well. Since the assets are not now recorded in the

1. *The Public Accounts of Canada*, (1977-78) section 8.9 "Contingent Liabilities as at March 31, 1978."

Government of Canada's statement of assets and liabilities, not stating the liabilities does not result in any misrepresentation of the Government's aggregate direct liabilities.

Further, although the *Financial Administration Act* establishes that the borrowings of Crown corporations *qua* agents are a direct liability they are more in the nature of contingent liabilities since the principal and interest are paid by the corporations themselves, not by the Government or out of the Consolidated Revenue Fund. The CRF is brought into play only in the very unlikely instance of a default by a Crown corporation. Accordingly, such borrowings are recorded in the Public Accounts as contingent liabilities.

The implications of agent of Her Majesty status are reflected in the Government's proposals.

First although the day-to-day management of Crown corporations can be conducted at arm's length from the Government, Crown corporations (as agents) both legally and practically are inextricably linked with the Government and have to be perceived in that light. Second, the commercial viability of Crown corporations must be assessed in light of the benefits which result from agent of Her Majesty status. Several corporations constituted as agents of Her Majesty that appear to be commercially viable would probably be less viable, or not commercially viable at all, if agency status were to be removed. This factor has incidentally significant implications for any consideration of the "privatization" of Crown corporations.

Any distinction between those Crown corporations constituted as agents of Her Majesty and those without agency status may be somewhat academic, however, at least for purposes of financing. Under the *Financial Administration Act* there is no doubt that commitments of agents are commitments against the Consolidated Revenue Fund, while commitments of non-agents are not. However, in practice one wonders if a potential investor, when dealing with a non-agent Crown corporation, would not base his investment decision at least as much on the fact that the enterprise was wholly-owned by the Government than on the value of the corporation's own assets and financial performance. As such, for purposes of financing, the practical perception of Crown corporations in the capital markets probably varies little between agents and non-agents.

Having established certain distinguishing characteristics of Crown corporations which were taken into consideration in drafting the Government's proposals, the following section proceeds with a more detailed explanation of control, direction and accountability of Crown corporations.

Power of Direction

One of the more fundamental of the Government's proposals is that the Governor in Council be authorized to issue binding directives to Crown corporations. Under

the proposals, any directive issued would be tabled in Parliament and published in the Canada Gazette. In the case of Schedule D corporations, the directive would be limited to one of "a general nature" and when a directive was contemplated or had been issued, the Governor in Council could decide to provide compensation for losses that occurred as a direct result. As an administrative measure, the Government intends to ask Crown corporations to publish the text of any directive in the annual report along with an estimate or accounting of costs incurred as a result.

As was discussed in the General Introduction to this paper, ministers are responsible to Parliament for ensuring that management errors of non-departmental bodies that come to their attention are corrected. Ministers are also responsible for the general framework of policy within which non-departmental bodies operate. In the case of Crown corporations, therefore, the directive power would be an essential mechanism to effect ministerial responsibility, in that a directive may be used both as an instrument to communicate government policy to the corporations concerned and as an instrument to correct management errors or omissions. In the absence of the directive or an equivalent power, ministers will be forced to continue to rely on a process of informal persuasion. The Government however, is convinced that such a process is first of all often ineffective, and secondly, because it is hidden from public scrutiny, blurs accountability. Furthermore, informal persuasion of this type has frequently caused friction and resentment between Crown corporations and the government.

Consideration related to ministerial responsibility underlay as well the proposal that directives to Schedule D corporations be limited to those of "a general nature". As discussed in the Introduction, ministers are accountable to Parliament for the exercise or any decision not to exercise the powers, duties and functions vested in them by Parliament. Schedule D corporations, because of the nature of their activities, have in the main been established by Parliament so that responsibility for day-to-day management and internal operations lies with the boards of directors. The Government was concerned that an authority of the Governor in Council to issue directions of unlimited scope to Schedule D corporations would bring their day-to-day management and internal operations under direct Government control and, in response to inevitable parliamentary and public pressure, bring almost any aspect of the corporations' affairs under parliamentary scrutiny and debate, eventually destroying the autonomy of the boards and placing an incredibly heavy workload on ministers and Parliament.

On the other hand, Parliament has made many of the corporations listed in Schedules B and C susceptible of Government control and direction with respect to many aspects of day-to-day administration, since the nature of their functions and operations is such that this degree of direction and control is both necessary and appropriate. Consequently, directives of unlimited scope, while possibly inappropriate for Schedule D corporations, are considered appropriate for those corporations listed in Schedules B and C. The fact that all directives are to be tabled in Parliament and published in the Canada Gazette will act as a protection for the corporations against undue intervention in the management of day-to-day activities.

Considerable attention has been directed to the definition of the phrase "of a general nature". Several special Acts of incorporation already authorize a minister or the Governor in Council to issue directions "of a general nature". However, no directives have been issued under these authorities. Consequently there are no precedents on which we may rely. Similarly, although the British *Nationalized Industries Act* authorizes the Secretary of State, on behalf of the Government of the United Kingdom, to issue directions of a general character to nationalized industries, the power has been very infrequently used.

There are some general rules, however, that may assist in defining the meaning of a directive of a general nature. Such a directive could not apply to any particular managerial decision of an operational nature. A directive of a general nature could, however, be issued to enforce corporate obedience to broad government guidelines in areas such as commercial activities abroad. A directive of a general nature could also be issued to require a Crown corporation to pursue government policies of general application, such as the federal official languages policies and policies with respect to decentralization or regional development, where the corporate objects and powers allowed.

In terms of ministerial and corporate responsibility a minister would be accountable before Parliament for the

issuance of a directive and its effects, including its costs. The board of directors, on the other hand, would be responsible to Parliament for the efficiency and effectiveness with which the directive had been implemented, for only the board has at its command the necessary powers of implementation.

In March 1978, the Government of the United Kingdom tabled in Parliament a White Paper entitled "The Nationalized Industries."¹ After apparently considerable study of the matter, the Government of the United Kingdom has concluded that a minister must have the power to give to a board of directors of a nationalized industry either general or specific directions on matters which appear to him to affect the national interest. The White Paper recognizes the dangers inherent in such an authority, but concludes that

"... Ministers do not intend that, as a result of the availability of this power, they should be drawn into detailed intervention or Parliamentary discussion of a multitude of matters of day-to-day management, which should

1. "The Nationalized Industries" presented to Parliament by the Chancellor of the Exchequer, (Her Majesty's Stationery Office, London) March, 1978.

in principle, and must in practice, be left to those responsible for managing and running these industries without the intervention of Ministers or Parliament."¹

In responding to the Canadian Government's proposals a number of briefs, especially those from Crown corporations, displayed considerable doubt that the proposed formulation of a directive "of a general nature" could work in practice. In their opinion, the phrase was too vague both in practice and in law for any consensus on interpretation. Accordingly, some of the briefs forecasted an endless wrangle between the Government and Schedule D corporations as to whether a directive were really "of a general nature".

After publication of the Government's proposals, Parliament considered the Bill Respecting the Reorganization of Air Canada. Section 8 of that Bill provided that

The Corporation shall, in the exercise of its capacities and the carrying out of its activities, comply with directions of a general nature given to it in writing by the Governor in Council.

1. *Ibid*, paragraph 22, p. 11.

Committee hearings in both the Senate and the House of Commons began to illustrate clearly that it was difficult indeed to define the phrase "of a general nature". Suggestions were made that in order to implement a general Government policy the Government might indeed require a power to issue a very specific directive, even to a Schedule D corporation. In fact, specific directions may have been what the Honourable Willard Z. Estey¹ had in mind when he suggested the Government have a power to issue directions to Air Canada.

In light of the U.K. White Paper, the reactions to the Government's proposals and the deliberations that took place leading up to approval of the *Air Canada Act (1978)*, the Government is now reconsidering the advisability of seeking authority to issue directions "of a general nature" and may conclude that a plenary directive power unqualified save that it be in the national interest² be applied to all Crown corporations. The requirement that all

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1. The Air Canada Inquiry Report, Ottawa: Queen's Printer, October, 1975.
 2. The phrase "the national interest" may be no less ambiguous than the phrase "of a general nature". Accordingly, it may be that the determination whether a directive is truly in the national interest must be left to the judgement of the Governor in Council subject, of course, to queries from Parliament once the directive is tabled or published.

directives be published may be sufficient to ensure that no government interferes in the day-to-day management of a corporation or does so only in order to pursue the legitimate national interest.

Compensation for Losses

In the main, Parliament has indicated that it expects Schedule D corporations to undertake the implementation of public policy objectives as much as possible on a financially self-sustaining or commercial basis. For example, subsection 66(3)(c) of the *Financial Administration Act* indicates that a Schedule D corporation

is ordinarily required to conduct its operations without appropriations.

In other words, Schedule D corporations are to finance themselves from their own receipts or from loans from private sources or the Consolidated Revenue Fund.

More specifically, directors of Air Canada have been directed by Parliament to have due regard to sound business principles, and in particular, the contemplation of profit.¹

Finally, during debates and question period, parliamentarians have from time to time, made it clear that they feel that the overall performance of Schedule D Crown corporations must be judged, at least in part, by their financial performance as indicated in the balance sheets.

1. *Air Canada Act*, *op cit*, s.s. 7(2).

While single-minded pursuit of profit could detract from the pursuit of public policy objectives there is no question that, especially in the case of Schedule D corporations, the balance sheet is one valuable measure of managerial performance.

The balance sheet and the bottom line may also be a criterion that is considered by potential investors before purchasing the securities of a Crown corporation - especially those corporations that are stated not to be agents of Her Majesty.

To protect the integrity of the balance sheet as a measure of performance, the Government has proposed that the Governor in Council might provide compensation to Schedule D corporations for losses incurred as a direct consequence of a directive. No compensation would be paid for losses resulting from a directive to require a corporation to do something it should have done as a matter of course under its special Act of incorporation or other legislation.

Compensation would also not be provided to cover losses resulting from goods or services provided by the corporation at its own initiative on a "loss leader" basis.

Since publication of the Government's proposals, Crown corporations have reacted that the proposed discretion of the Governor in Council provides to the corporations little real security. Accordingly, the Government is now reviewing this element of the proposals and may conclude that Crown corporations should have the procedural right to seek compensation from the Governor in Council.

The Government does wish to assure corporations that fair compensation would be paid to corporations resulting from directives requiring corporations to undertake non-economic objectives in the pursuit of government policy which the corporations could not reasonably be expected to pursue as a matter of course.

In any event, the Governor in Council after consultation with the corporation concerned, would specify the method of calculation of the losses incurred, determine the method of payment of all compensation and may direct that an independent audit be made of the losses. In many cases, that independent audit could be performed by the Auditor General of Canada. Compensation payments would be provided by specific parliamentary appropriations.

Although the Government acknowledges that the computation of losses may in some cases be difficult, it is hoped that, whenever possible, the use of cost centres by Crown corporations might assist accurate and objective assessment.

Corporate Budgets

Under the *Financial Administration Act* the operating and capital budgets of Schedule C corporations must be approved by the President of the Treasury Board and the designated minister; the capital budgets of Schedule D corporations require approval by the Governor in Council

on the recommendation of the President of the Treasury Board, the Minister of Finance and the appropriate minister. Once approved, capital budgets are tabled in Parliament. Symbolic of the operational autonomy of Schedule D corporations *vis-à-vis* the Government is the fact that no Government approval is required for operating budgets under the *Financial Administration Act*.¹ Indicative of the operational independence of Schedule C corporations from Parliament's control and scrutiny is the fact that under the *Financial Administration Act* their operating budgets are not tabled in Parliament even when they entail substantial appropriations. Schedule B corporations are financed through Estimates in exactly the same way as departments and do not submit operating or capital budgets.

All appropriations and loans from the Consolidated Revenue Fund and borrowings from the capital markets by Crown corporations constituted as agents of Her Majesty, must be approved by Parliament in a general fashion¹ or on a case by case basis through Estimates.

All capital budgets of Crown corporations are tabled in Parliament. Through Estimates or the tabling

1. For example, where Parliament gives to the corporation a general borrowing authority in the special Act of incorporation.

of capital budgets the appropriate minister by inference is stating his support of the financial plans of the Crown corporations and is assuming responsibility for them insofar as they impact on the Consolidated Revenue Fund and the fiscal framework.

Capital and operating budgets of Crown corporations are the most important means whereby the minister and ministry may control¹ the implementation by Crown corporations of public policy objectives, provide the means whereby corporations and the Government reach agreement on long and short-term objectives, the level of financial performance and financing strategies. Similarly budgets provide the most effective means, along with annual reports, whereby the minister may supervise the general performance of the corporations and be warned of managerial errors and other shortcomings.

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1. The control exercised here often relies entirely on the Government's ability to withhold approval of a budget in order to force a corporation to pursue a certain objective. If, however, the corporation does not require funds (appropriations or loans) from the Consolidated Revenue Fund, even this veto power is ineffective. The mechanism of budgetary approval provided by Part VIII of the *Financial Administration Act* is an illustration of the difficulties inherent in using essentially financial controls to achieve policy purposes, hence the need for a directive power.

Yet until recently the budgets submitted by Crown corporations have been, in the main, deficient in terms of quality, realism and exactitude. As such they have not provided ministers with fully effective means whereby they may fulfill their responsibilities before Parliament and have failed to provide Parliament with sufficient information by which it could hold the ministry or the corporations to account effectively. This, coupled with the fact that most Crown corporations have a significant impact on the fiscal framework and the liabilities of the Government of Canada, led to the Government's proposals respecting the budgets of Crown corporations.

First, the Government proposes that annual budgets be accompanied by a corporate plan that will place the budgets in the context of a three to five-year horizon, allowing ministers and Parliament better to assess the long-term direction, objectives and plans of each corporation as well as the long-term implications of the annual budget. Equally important, the long-term corporate plan will force both the corporation and the Government to specify corporate objectives in the context of wider Government objectives and will introduce a degree of prospective approval by the Government into the process. Corporate plans would be tabled in Parliament along with budgets, modified by the corporations so as not to prejudice the competitive position of those Crown corporations that do actively compete in the market place.

Obviously, every Crown corporation will not be required to file the same kind of corporate plan. As one illustration, a corporate plan submitted by the Export Development Corporation as a banking and insurance undertaking would be quite different from a Crown

corporation operating a manufacturing undertaking. The exact nature of the corporate plans to be submitted by individual Crown corporations or groups of Crown corporations will be worked out by the departments most intimately concerned in consultation with the corporations themselves.

Second, the Government has proposed that once a capital budget is approved by the Governor in Council the corporation should abide by it. If a corporation wishes to enter into significant capital expenditures and commitments not contemplated in an approved budget, the corporation should submit a revised or supplementary budget for the approval of the Governor in Council which would then be tabled in Parliament.

In this way it is hoped that capital budgets will become more effective instruments of ministerial control and accountability and provide the means whereby the Consolidated Revenue Fund is protected from unforeseen liabilities. If implemented this reform should also provide for a more objective standard by which corporate performance can be assessed on a *post facto* basis by the Government and Parliament. As indicated in the Government's proposals, the detail of the budgets and, therefore the detail of approval, would be established by regulation for each corporation or group of corporations and adapted to the particular requirements, circumstances and record of performance of each.

The Government has also proposed that budgets must be signed by at least two directors of the corporation prior to submission to the Government. Although seemingly a small detail, the purpose of

this proposal is to correct a practice that has occurred from time to time where budgets were prepared by management and given only cursory attention by the board of directors, or given full attention only after the budget had been approved by the Governor in Council. Through this proposal the board would be forced to take responsibility for the budgets, and hopefully as a consequence, give them the attention they deserve.

Finally, so that Parliament may more effectively fulfil its role with respect to scrutinizing the use to which public money is put prior to voting that money, the Government has proposed that operating budgets of Crown corporations be tabled in Parliament along with the Estimates when possible when the corporations require significant appropriations.

As long as the majority of Crown corporations are agents of Her Majesty, as long as they are instrumental in the achievement of public policy objectives and have a substantial impact on the fiscal framework, effective control by the Government over capital plans, commitments and expenditures must prevail. Concern has been expressed that this degree of control will increasingly bureaucratize the process of budgetary approval and restrict the managerial flexibility of Crown corporations. If Crown corporations plan well, are sensitive to stated Government objectives and priorities and provide

sufficient information to Government to support their budgetary proposals, there is no intrinsic reason for the process becoming bureaucratized or corporations losing their autonomy. In any event, an alternative which places the control of the expenditure of public money for public purposes outside the control of elected officials would be unacceptable in the present constitutional framework.

In implementing the spirit of the Government's proposals respecting budgets from Crown corporations and within the existing legislative framework, the Treasury Board has issued a circular defining the process of capital budgets and the information budgets are to contain. Budgets submitted since distribution of the circular are required to indicate clearly the impact of the budgetary proposals on the achievement of national policies and objectives. Crown corporations have also been encouraged to submit long-range corporate plans to be considered by ministers and annual budgets are to be prepared on the basis of those plans and any deviation from them must be noted, explained and defended. Budgets also are to provide selected information on the past operating performance of Crown corporations in terms of revenues, profits and cash generated as well as on future years' operations. When long-term commitments are proposed in a budget, the document must explain the implications of those commitments and the source or sources of funds planned to finance them.

Proposed capital budgets are to be submitted to the Treasury Board Secretariat by Crown corporations through the appropriate minister at least three months in advance of the beginning of the financial year to which

they apply. This lead time is required to allow the government to give full consideration to the budgetary proposals, allow the government to plan effectively the allocation of resources when funding is required from the Consolidated Revenue Fund, and provide the corporations with more lead time to plan their activities in advance of the beginning of the financial year to which the budgets apply.

All capital budgets are considered by Treasury Board prior to consideration by Cabinet and are also studied by a policy committee of Cabinet when significant policy issues are involved.

Contrary to the fear expressed by several Crown corporations in response to the Government's proposals, the new procedure, when it has been followed, has made the budgetary approval process more efficient. The new procedures have resulted as well in less, rather than more, material being required in support of budgetary submissions.

The Schedules to the *Financial Administration Act*

Schedules B, C and D to the *Financial Administration Act* now list 53 Crown corporations. The three classes of Crown corporations under the *Act* are subject to varying degrees of government control and parliamentary scrutiny *vis-à-vis* financial management and control. The Schedules have been

criticized for their apparent irrationality with respect to the listing of individual Crown corporations. However, the present Schedules are not nearly as irrational as they may seem to be at first glance, and by and large, illustrate clearly three gradations of degree and type of government control, direction and accountability.

For purposes of the *Financial Administration Act* Schedule B corporations are treated exactly like departments of government. In addition, as a general rule, the special acts of incorporation of Schedule B corporations vest with the minister considerably more powers of control and direction with respect to day-to-day operations and management than occurs under the special acts of Schedule C and D corporations. Further, in several instances, a Schedule B corporation is in fact, a "corporate shell" or "corporation sole" integrated within a department.¹ In such cases a corporate instrument was established and persists to allow a department or ministers to acquire, hold and dispose of property in a manner more efficient than that possible through a department.

The basic purpose behind listing organizations such as the Economic Council of Canada, Medical Research Council, National Research Council and Science Council of Canada as Schedule B corporations appears to have had the objective of keeping the management of the activity independent from the controls applying to departments with respect to personnel recruitment and compensation. Consequently, these four organizations are "separate employers" within the meaning of the

1. For example, the Director of Soldier Settlement, the Director, Veterans' Land Act.

Public Service Staff Relations Act.

Schedule C corporations, because they must submit operating as well as capital budgets to the government for approval and may be required to follow the government's contract regulations, are subject to significant operational control by the ministry. Further and as a general rule, although not going to the same extent as those of corporations listed in Schedule B, the constituent acts of Schedule C corporations usually vest significant powers of direction and control with the ministry or minister. For example, as was illustrated in the Introduction to this paper, the Governor in Council has authority with respect to the National Harbours Board

to make by-laws for the direction,
conduct and government of the Board
and its employees and for the
administration of the several works
and property under its jurisdiction.¹

The National Capital Commission's special act of incorporation authorizes the Governor in Council to approve the plan of organization for the establishment and classification of employees of the Commission, compensation rates and other terms and conditions of employment.

1. *National Harbours Board Act*, RSC, 1970, N-8 ss. 14(1)

The special acts of incorporation of the Northern Canada Power Commission, Royal Canadian Mind and Canadian Commercial Corporation (a Schedule C corporation) authorize the Governor in Council to issue directions of an unlimited nature to each corporation.

Like Schedule B corporations, all corporations listed in Schedule C are agents of Her Majesty. However, the majority of Schedule C corporations do not fall under the authority of the *Public Service Staff Relations Act* and, therefore, are not subject to the personnel controls applying to departments generally. Illustrative that several operate in a quasi-commercial environment is the fact that the majority come under Part V of the *Canada Labour Code*, and, therefore, bargain and conduct labour relations in the same environment and under the same legal requirements as many private sector companies.

Finally, the boards of directors of Schedule C corporations are often composed in whole or by a majority of public servants, and there is often a strong link with the department of responsible minister.¹ In the case of several Schedule C corporations, the deputy minister of the department serves as the chairman of the board.

Schedule D corporations are expected to be financially self-sustaining and often operate in competition with companies in the private sector. Under the *Financial Administration Act*, therefore, they are not subject to the degree of control applying to Schedule

1. For example, the Supply Administration Branch provided a good part of the operational capacity of the Canadian Commercial Corporation (CCC) prior to the CCC's transfer to the responsibility of the Minister of Industry, Trade and Commerce.

B and C corporations and need submit only capital budgets for the approval of the Governor in Council. Without exception all Schedule D corporations fall under the jurisdiction of Part V of the *Canada Labour Code* and, finally, several boards of Schedule D corporations have no public servants as directors and, where public servants are appointed as directors, they seldom form a majority of the board. Schedule D corporations, as a rule, operate quite independently of the department of the appropriate minister.

The present Schedules have been criticized because they are expected to fulfil two roles: establish gradations of financial management and control as well as establishing gradations of policy control. Several responses to the Government's proposals have suggested that this is an inherent weakness of the Schedules, because the appropriate degree of policy control may not be compatible with the appropriate degree of financial control.

Policy control and accountability are most often achieved through requirements related to financial control and accountability. The degree of financial control and accountability defines the degree of policy control and accountability. Consequently, the Schedules of the *Financial Administration Act*, in defining the gradations of financial control by the government over Crown corporations, are also defining gradations of policy control. In fact, the history of the Schedules indicates that governments frequently decide the degree of policy control and accountability required with respect to a corporation and then place the corporation in the Schedule that will provide that control and accountability through financial controls.

The fact that the present Schedules define the types of functions undertaken by the corporations listed in each of the three Schedules has, however, been an impediment to effective classification. For example, the present *Financial Administration Act* requires that Crown corporations conducting lending or financial activities must be listed in Schedule D. Yet from time to time circumstances might dictate that a corporation undertaking such functions should be placed under increased government control than that provided for Schedule D corporations and, therefore, should be located in Schedule C or B. For this reason the Government has proposed that the description of functions be removed from the definition of each Schedule. Each Schedule, however, would continue to have distinguishing characteristics with respect to financial control and accountability and a corporation would be listed in whichever Schedule would provide the appropriate degree of overall control. A brief description of those distinguishing characteristics is provided in Annex A to this paper.

There has been some criticism that there are too few Schedules to accommodate the different degrees and combinations of types of control and accountability which the government and Parliament might wish to apply to Crown corporations. The criticism is probably well founded, but an analysis of Crown corporations illustrates that a large number of Schedules would be required, with a very few corporations in each, to obtain anything approximating a complete comprehensive categorization. A large number of schedules would undoubtedly lead to fairly cumbersome legislation. As an alternative, the Government has proposed the retention of the three basic Schedules, but has also proposed sufficient flexibility in the application of financial controls to individual

corporations to allow the government and Parliament to adapt the degree of control to the circumstances of each corporation. It may well be, however, that one or two more Schedules may have to be added if the Schedules are to encompass all Crown corporations.

At present very few of the subsidiaries of Crown corporations are found in the Schedules to the *Financial Administration Act* and are, therefore, often subject to different financial controls and less accountability to the government and Parliament than the parent corporation. In order to bring as many corporations as possible under the authority of the general Crown corporations legislation, the Government will suggest new Schedules to that legislation that include wholly-owned subsidiaries of Crown corporations along with their parent.

As a general rule subsidiaries (both consolidated and non-consolidated) would not be treated for purposes of the legislation as distinct Crown corporations in their own right. It would not be a condition of the legislation, for example, that all subsidiaries submit their own annual reports and budgets. Certain requirements of the legislation, such as the necessity to obtain Governor in Council approval prior to the establishment of subsidiaries, would apply to subsidiaries.

Boards of Directors

As with the management entities of other non-departmental bodies, the boards of directors of Crown

corporations have been vested by Parliament with the powers, duties and functions necessary to undertake the day-to-day management of the corporation, subject to varying degrees of ministerial control and direction. The Canadian National Railways' special act of incorporation, for example, states that

"...the direction and control of the National Company and its undertakings are vested in a Board of Directors."¹

As such the Board of Directors of CNR, like the boards of other Crown corporations, is accountable directly to Parliament for the conduct of its powers, duties and functions. The Minister is accountable to Parliament for the exercise of those powers, duties and functions vested with him and also for ensuring that any managerial errors are corrected. The minister is also responsible for the communication of broad policy objectives to the corporation for implementation within its corporate mandate, objects and powers. Having received policy guidance it is the duty of the board to ensure that implementation is undertaken swiftly and in the most efficient and effective fashion possible.

Boards of Crown corporations - as well as management entities of other non-departmental bodies -

1. *Canadian National Railways Act*, RSC 1970, C-10 ss. 6(1).

have significant residuary powers, duties and functions in addition to the powers, duties and functions vested with them by statute. The special act¹ in conjunction with the *Financial Administration Act*, explicitly vests the board of directors and the ministry with powers, duties and functions. The special act, by-laws or directions² may explicitly further distribute powers, duties and functions between the board and minister. Within the framework thus established the board has been vested with a range of explicit powers, duties and functions, but is also vested with a range of implicit or residuary powers related to the conduct of the business and affairs of the corporation which have not explicitly been assigned to another authority.

Carrying the distribution of duties, powers and functions a step further, the board of directors will explicitly assign certain powers, duties and functions to the chairman, president and committees of the board through the corporate by-laws. In turn, several of the powers, duties and functions of the president and chairman will be explicitly delegated to corporate officers.

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1. Or in the case of companies incorporated under companies legislation, the letters patent or articles of incorporation and the provisions of the companies legislation itself.
 2. Or unanimous shareholder agreements if the company is incorporated under the *Canada Business Corporations Act*.

A compilation of the full range of powers, duties and functions of a particular board of directors would require a complete analysis of both the explicit and residuary powers, duties and functions. For the conduct of their residuary powers, boards are accountable to Parliament in the same way as they are accountable for the conduct of their explicit powers.

Unlike boards of directors in the private sector that are elected for one year terms at annual shareholders meetings, directors of Crown corporations (other than those established under the *Canada Business Corporations Act* or *Canada Corporations Act*) are appointed for terms varying from three to ten years. In large part, the longer terms of appointment were intended to insulate directors from any interference by the government not related to the pursuit of national objectives, or to the fulfillment of ministerial responsibilities.

Although the directors of most Crown corporations serve "during pleasure", several special acts of incorporation provide an additional degree of security to the appointee. Directors and the President of the Canadian Broadcasting Corporation hold office "during good behaviour"; directors of Canadian National may be removed only "for cause". In the case of Air Canada, the Chairman and directors hold office "during good behaviour" and may be removed only "for cause", while the President serves "during good behaviour". The purpose behind this latter arrangement is, on one hand, to insulate the Board from undue intervention and ensure the continuity of management while, on the other, ensure through the President that the Corporation is responsive to public objectives.

Boards of directors play the pivotal role in the management of Crown corporations and the performance of Crown corporations as effective and efficient instruments for the achievement of policy directives depends on them. Yet, directors of Crown corporations are often uncertain of their role and their relationship to the minister and Parliament. Problems of management have, on occasion resulted forcing the government to intervene and take corrective action. Fault has not lain only with the boards; the government has frequently been unclear in informing boards of their duties and responsibilities and the government's expectations. To correct this situation the Government has proposed that the duties, responsibilities and liabilities of directors of Crown corporations be clarified through general Crown corporations legislation. Secondly, although those duties and responsibilities are not identical to those of directors and are not identical to private sector corporations - they are sufficiently analogous so that the regime established by the *Canada Business Corporations Act* has been proposed as a model.

Because they are directors of Crown corporations, charged with the management of public funds and national assets, individuals appointed to the boards of Crown corporations have duties in addition to those of directors of companies in the private sector and are accountable to the government and Parliament for their exercise. The essential differences between directors of Crown corporations and private sector companies relate not to legal responsibilities, duties, powers and liabilities, but the extra considerations or the non-legal factors that impact on corporate decision-making simply because they are directors of corporations

established and owned by the Government of Canada.¹ Although not practical in all cases, whenever possible those additional factors and considerations should be set out in legislation, regulations or by-laws as a reference point for directors and as an objective measure of conduct.

Finally, because they are appointees of the Government, the conduct of directors, presidents and chairmen reflects inevitably and unavoidably on the Government. In addition, directors of Crown corporations may, from time to time, be privy to information not generally available in the private sector. Consequently, the Government has proposed that the standard of conduct established by the *Canada Business Corporations Act* be supplemented in the case of officers and directors of Crown corporations.² The intent of these proposed requirements is to guard against real or perceived conflicts of interest on behalf of officers and directors of Crown corporations.

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1. If it were necessary to establish an analogy with private sector practice, the circumstances under which boards of Crown corporations operate would be somewhat like the position of directors in the private sector operating under a unanimous shareholder agreement under the *Canada Business Corporations Act*.
 2. See the Government's Proposals, *op cit*, Appendix A, s.s. 9 and 10.

Reactions to the Government's proposals suggested that the governments held to themselves many of the powers that, in the private sector, are exercised by directors. Accordingly, directors were in a weak position relative to their private sector counterparts. Consequently, the Government is now reviewing various methods of adding to the authority of boards, such as giving them a larger role in the selection, dismissal and setting the salaries of their respective chairmen and presidents and in the selection of the outside auditors.

Chairmen, Chief-Executive Officers and the Boards

The line of communication and accountability between the minister, government and Parliament on the one hand and the corporation on the other is usually through the chairman of the board. It is the chairman therefore, through whom the corporation's board of directors is held accountable before the minister and Parliament and who accepts responsibility on behalf of the corporation's board of directors for actions and errors. The chairman is also the link whereby the government and Parliament communicate public policy objectives that are to be achieved by the corporation within the framework that has been established by Parliament through the constituent act.

In some instances, the person holding the position of chairman is also the chief-executive officer of the Crown corporation. In an increasing

number of cases, such as Canadian National, Air Canada and Petro Canada, the chief executive officer is another corporate officer (i.e. the President) and not the chairman.¹ In such cases the chairman, as the representative of the board, is still considered to be the main link with government with the emphasis of the chief-executive officer's role being on the internal management of the corporation.

The split in responsibilities between chairmen and chief-executive officers is slightly more common with respect to Crown corporations than private sector companies, largely because the Government of Canada is a far more complex owner than the usual shareholder in the private sector. In addition, Crown corporations are significant instruments in the achievement of public-policy objectives. The duties of the chairman and chief-executive officer, as a consequence, are more onerous. Moreover, the public has expectations of Crown corporations and makes demands of them greater than those usually made of other companies. As a consequence, the job of external relations implies a more onerous responsibility with respect to Crown corporations. Furthermore, any steps taken to make boards of Crown corporations more effective, such as those proposed by the Government, will place an extra burden on boards and consequently the chairman. Finally,

1. In the private sector as well there seems to be a trend to having two individuals serve respectively as chairman and chief-executive officer.

the boards of directors must act as a check on management as well as a guide. A board of directors would probably be better equipped to fulfil this role if it were headed by a chairman who, unlike the chief-executive officer, is not a member of management.

In the existing regime the chairmen, chief-executive officers and directors of Crown corporations incorporated by a special act of Parliament are appointed by the Governor in Council. In the case of the majority of this group of Crown corporations the appointment of the chief-executive officer and chairman is considered to be within the prerogative of the Prime Minister. Even when a minister has the power by statute to appoint or approve the appointment by the board of a chairman and chief-executive officer¹, by convention the appointment is undertaken in consultation with his colleagues in Cabinet, especially the Prime Minister.

The Governor in Council has the statutory power to "set", "fix" or "approve" the salaries paid to the directors, chairmen and chief-executive officers of only those Crown corporations established by a special act of Parliament. This authority has been suggested to allow the government to apply a uniform system of remuneration and performance evaluation across the

1. This occurs for those corporations incorporated, not by a special act of Parliament, but under companies legislation such as the *Canada Business Corporations Act*.

spectrum of Crown corporations. Work is now underway within the Privy Council Office devising a classification structure and performance evaluation system which will recognize the peculiar circumstances and requirements of Crown corporations in general as well as individual corporations or groups of corporations in particular with respect to remuneration and performance evaluation.

Audit Committees

Audit committees of boards of directors are a relatively recent phenomenon that has gained wider and wider acceptance in the United States and is beginning to enjoy increased acceptance in Canada as well. Although the U.S. Securities and Exchange Commission (SEC) suggested the use of audit committees as early as 1940, the greatest growth of audit committees did not take place until the late 1960's and into the 1970's. In 1972 the U.S. SEC "strongly recommended" the formation of audit committees.

In Canada, the Select Committee on company law recommended to the Ontario Legislature that statutory requirements be put in place to establish audit committees. In 1968 the Canadian Institute of Chartered Accountants (CICA) strongly recommended the inclusion of the requirement for audit committees in federal and provincial companies legislation and in 1969 the Royal Commission inquiring into the affairs of Atlantic Acceptance Corporation Limited suggested that audit committees become a fixture in all public corporations.

The *Ontario Business Corporations Act*, which came into force in June 1970, was the first Canadian companies legislation to require the establishment of

audit committees for all those corporations that offer securities to the public. The Ontario requirement was soon followed by a similar provision in the *Companies Act* of British Columbia and has since found its way into the *Canada Business Corporations Act* (subsection 165(1)).

Audit committees¹ are most effective when they are composed of "outside" (i.e. non-management) directors and meet on a regular and routine basis. Audit committees perform many functions, but at a minimum they work with the outside auditor, the comptroller and the inside auditor and are a forum for the outside auditor to raise with directors questions of fraud, illegal conduct or simply basic differences of opinion on audit matters. Their basic role is to scrutinize annual financial statements, quarterly or interim financial statements and prospectus statements and make recommendations to the board of directors.

The establishment of an audit committee by corporations seeks to achieve a number of objectives, namely:

- . To act as a direct channel between the auditors and directors and thereby reinforce

1. SOURCES: Wai P. Lam, "Audit Committees in Practice", *C.A. Magazine* (October 1975) p.p. 33-40; Louis W. Cabot, "Management and the Director", *The Conference Board Record*, April 1974, (Vol XI No. 4), p.50-55; C. Chazen and I.M.Landis, "Audit Committees - Why and How" *The CPA Journal* (August 1976), p.p.33-37; "The Case for Audit Committees", *The Accountant* (September 1, 1977) p.p. 1-2.

the independence of the auditor from corporate management;

- . To enhance the quality, integrity and objectivity of financial accounting and reporting;

- . To open up an effective communication channel between the auditor and directors. The audit committee gives to the auditor a routine forum. Without it, the auditor may be reluctant to go to the full board of directors over management's head except in cases of dire need.

- . The establishment of an audit committee can act as protection for directors, as well, by illustrating tangibly that they are applying "the care, diligence and skill" that a reasonably prudent person would in comparable circumstances as is required by the law.

Although no mention is made in the Government's proposals of audit committees, the Government accepts audit committees as a very valuable innovation for Crown corporations and any Crown corporations legislation prepared by the Government will probably reflect the requirement found in subsection 165(1) of the *Canada Business Corporations Act*.

Conclusions

Development of a comprehensive policy for the control, direction and accountability of Crown corporations has been a long and painstaking exercise. The last time such an undertaking was mounted was 1950 in preparation for the tabling of Part VIII of the *Financial Administration Act*. Since then the number and size of Crown corporations and the complexity of issues involved have expanded greatly.

The development of a policy has by decision of the Government, taken place in a consultative framework. Publication of the Government's proposals on Crown corporations had the expressed objective of eliciting responses from the Crown corporations, the Auditor General, the Royal Commission on Financial Management and Accountability and other expert and interested groups and individuals.¹

Since publication of the proposals an interdepartmental mechanism has been put in place to study the responses and refine and develop the proposals. The conclusion of this exercise will hopefully be the tabling of an omnibus Crown Corporations Bill in Parliament.

1. Responses were received from twenty Crown corporations, the Auditor General, the Public Accounts Committee, the Canadian Institute of Chartered Accountants, the Canadian Manufacturers Association, several underwriting firms and a number of private firms and individuals. Obviously, we still await the final report of the Royal Commission on Financial Management and Accountability.

Chapter IIMIXED AND JOINT ENTERPRISES

During the latter part of the 1960's and the early 1970's the federal government was instrumental in the establishment of a number of large mixed enterprises.¹ During this period several commentators suggested that mixed enterprises represented a new approach to Canadian public enterprise to rival the Crown corporation mode.² By 1979, the federal government was the majority shareholder in fifteen mixed enterprises. These enterprises in turn have frequently created or acquired subsidiaries. The Canada Development Corporation, for example, now has a majority interest in some seventy-four subsidiary companies located in Canada and around the world.

Because private investors own a portion of the shares of mixed enterprises, in order to maintain private sector interests mixed enterprises are seen largely as business enterprises. Pursuit of profit by mixed enterprises must, however, be undertaken along with the pursuit of public policy goals. The Canada Development Corporation, for example, has the statutory duty to

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1. Notably Telesat Canada (1968) Panarctic Oils Ltd. (1966) and the Canada Development Corporation (1971).
 2. See Stuart Holland, The State as Entrepreneur, London Wendenfield and Nicolson, 1972. "Adoption and Adaption of the I.R.I. Formula."

carry out certain public policy objectives,¹ but
 "in anticipation of profit and in
 the best interest of the
 shareholders as a whole"²

Given that the "anticipation of profit and the best interests" of the private sector investors would tend to direct the management of mixed enterprises to the single-minded pursuit of profit, the mixed enterprise formula, be it in Canada, Italy or elsewhere, has within it an inherent dichotomy: the maximization of commercial gain on one hand and the pursuit of public policy objectives on the other. In the dichotomy the pursuit of public policy objectives constantly runs the risk of falling by the wayside.

This situation may well have been exacerbated by recent developments in Canadian company law, which establish that the paramount duty of a director or a corporation is to pursue the best interests of its shareholders. In the case of corporations wholly-owned by Her Majesty in right of Canada (i.e. Crown corporations) the government's primary interest is the pursuit of public policy objectives. In the private sector the objective test of the best interest role is the maximization of profit. When these potentially conflicting "best interests" are juxtaposed in a mixed enterprise problems may well result.

1. *Canada Development Corporation Act* Statutes of Canada 1970-71-72, Chapter 49 section 6(1).

2. *Ibid.*

Were the Government of Canada, as a majority shareholder and through its control of the board of directors, to seek to have the corporation pursue public policy objectives that were not in the best interests of the corporation *vis-à-vis* profits, a dissatisfied minority shareholder might well apply to the courts for relief on the grounds of oppression. It does not necessarily follow that he would succeed, but even if he did not, his action might have considerable and undesirable nuisance value.

At the same time parliamentarians and the public generally do not always seem to comprehend the distinction between a Crown corporation and a mixed enterprise. Ministers, accordingly, find themselves being called to account for the actions of mixed enterprises in the same way as they are called to account for the actions of Crown corporations. Yet, ministers' relationships with mixed enterprises are far different from their relationships with Crown corporations. As a general rule, the federal government's role is limited to that of a majority or minority shareholder under companies law. Corporate budgets do not require government approval, there is never a directive authority provided exclusively to the government, borrowings from private sources seldom require any government approval, the government's contract regulations seldom apply and public servants when they do sit on the boards of directors are a small minority.

The rapid growth of joint enterprises is also a phenomenon of the late 1960's and now the federal

government is the majority owner or shareholder of some eleven¹ such corporations in partnership with provincial governments or the Government of the United States. Since only governments are involved, presumably with their primary interest being the pursuit of public policy objectives, the inherent dichotomy that exists in the mixed enterprise mode does not exist to nearly the same degree with respect to joint enterprises.

In constructing a policy on the control, direction and accountability of the various types of federal public enterprises, it has been the Government's intention to concentrate first on Crown corporations and devise and implement an effective policy. Having done so, the Government could then move on to address the unique issues and problems raised by mixed enterprises - and eventually joint enterprises - issues the problems which are quite different from those relating to Crown corporations.

1. This figure does not cover those joint enterprises established under subsection 8(3) of the *Department of Regional Economic Expansion Act*.

SUBMISSION 3

SENIOR PERSONNEL IN THE PUBLIC SERVICE OF CANADA: DEPUTY MINISTERS

October, 1977

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I.

INTRODUCTION

The deputy heads of departments in the Government of Canada form the key senior management group in the public service. These individuals are, by virtue of the method of their appointment and of the positions they hold, the people most responsible, collectively and individually, for ensuring that government policy objectives are achieved and for the day to day effectiveness of public service management. Concomitantly, these individuals are most directly accountable to the body politic—to their respective Ministers, to the Prime Minister and Cabinet, and through them to Parliament and to the people. Their accountability is of a dual nature—to the Prime Minister who selects them and to the Minister for whom they work. It is through deputy ministers that the political control of the bureaucracy, an inherent feature of parliamentary government, is exercised.

Deputy ministerial and other senior appointments¹ are the prerogative of the Prime Minister. This prerogative derives from constitutional custom and convention respecting the authority of

¹ Deputy ministers constitute only a small portion of the individuals who are appointed by the Governor in Council. There are approximately three hundred and fifty full-time positions in the Governor in Council group, of which about thirty are deputy ministers. The remainder include the heads of Crown agencies and corporations, regulatory commissions, boards and tribunals. While these individuals are also appointed by the Governor in Council, the statutory bases of the non-departmental bodies which they administer provide for a greater degree of autonomy from political control than that provided for departmental forms. Hence, the relationship between a minister and the heads of the non-departmental bodies for which he is responsible is substantively different from the relationship between a minister and the deputy head of his department.

the Crown.² Ministers, nevertheless, often suggest candidates for deputy minister posts, are always consulted, and the Governor in Council must always approve the appointments.

The legal basis of Deputy ministerial appointments is found in the several acts establishing departments of the public service.³ The enabling legislation usually provides for the departmental name, the designation of a responsible Minister and the appointment by the Governor in Council of an officer to be called deputy minister. The duties, powers and functions of the Minister with respect to the department are set out in general terms. The departmental acts implicitly provide the basis for the delegation of the Minister's authority to his deputy who, in turn, may act in the name of the Minister.⁴ It is in this way that Ministers share their powers with their deputies.

Individually, deputy ministers provide the main source of policy advice and program support for their respective Ministers. Collectively, they provide, in large part, for the management of the public service. In supporting the collective responsibilities of their Ministers, deputies are required to work in concert with the Privy Council Office, through its Cabinet Committee secretariats to ensure that departmental policy and programs are consistent with, and supportive of, other government policies and programs endorsed by the Cabinet; the Treasury Board Secretariat, the

² The records show that a Minute of the Privy Council was passed on the basis of a submission made by Sir Charles Tupper on May 12, 1896 concerning the prerogatives of the Prime Minister. Included among the prerogatives was the appointment of deputy ministers. The same Minute was re-issued on four subsequent occasions by the following Prime Ministers:

Sir Wilfred Laurier	July 13, 1896
Arthur Meighen	July 19, 1920
R. B. Bennett	August 7, 1930
Mackenzie King	October 25, 1935

No Prime Minister since Mackenzie King has chosen to re-issue the Minute because it is regarded as firmly established. Some have, however, circulated the 1935 Minute to Ministers upon the formation of a Ministry.

The Privy Council Office now circulates to Ministers on a regular basis a list of current vacancies and future openings, thus providing them with the opportunity to recommend or suggest in a less formal way prospective appointees.

³ It is possible through inclusion of an item in the Estimates, Main or Supplementary, to obtain parliamentary approval for the creation of an office or position. The process can, and has been used to provide a legal basis for an office or position albeit infrequently and usually on an interim basis. The formal procedure for establishing organizations and positions in them is by a specific statute, rather than through the use of Appropriation Acts. Examples of the creation of an office or position through the Estimates include: Information Canada; Habitat '76; and the Office of the Co-ordinator of the Status of Women.

⁴ *The Interpretation Act* provides the explicit legal basis for ministerial delegation to the deputy head. (Section 23(2)). See Submission 1, pp. 38-39 and J. E. Hodgetts, *The Canadian Public Service* (Toronto, University of Toronto Press, 1973) p. 75.

government's central management agency, to ensure that coordinated management practices are developed and implemented for the system as a whole; and, the Public Service Commission, the central staffing agency, in support of a unified public service. The confederal nature of executive decision-making is an important factor influencing the manner in which the deputy minister will perform his functions in support of his Minister's individual and collective responsibilities.

In recent years, there have been several significant influences which have affected the role and responsibilities of deputy ministers. The public service has expanded in scope and size as the government has come to perform and provide an increasingly larger number of functions and services. The administration of government has become more complex as new systems and techniques have been devised and implemented to deal with the development and delivery of programs and services. While the basic nature of the responsibilities of deputy ministers has not changed, the scope and volume of their work has to such an extent that the job is today a very different one than was the case even twenty-five years ago. The present environment in which deputies discharge their responsibilities has given them a much higher public profile than they had twenty or thirty years ago. In particular, their role in the policy-making processes of government has become more visible.

The management of the deputy minister group, therefore, is of critical importance. The methods of selection, appointment, assessment and remuneration are all facets of such a management system. In particular, performance assessment is a critical element of the system. An important factor upon which a large part of the assessment is based is the manner in which a deputy upholds his Minister's individual and collective responsibilities and this constitutes a principal means whereby they are held accountable.

II

PROFESSIONALIZATION OF THE SENIOR RANKS IN THE PUBLIC SERVICE

The degree of a country's development or "nationhood" is sometimes measured by the extent to which its government is served by a technically competent career civil service.¹ The replacement of patronage by competitive examinations as the basis of recruitment into the public service, for example, is normally used as one measure of the extent to which a modern rationalized career public service has taken hold.² While the conditions of employment in a public service are by no means the only criteria by which a country's development may be assessed, its composition and structure, particularly at the senior levels, will say much about the state of public affairs and how these affairs are run.

The Canadian example, in many respects, is consistent with developments elsewhere. The concept of a career civil service had its genesis in the nineteenth century in Europe. As in so many other aspects of Canadian government, developments in the British system were a dominant influence.³ And yet, the kind of career civil service which emerged in Canada was very much the product of the North American setting.

¹ See N. W. Eisenstadt, *The Political Systems of Empires* (Toronto, Macmillan, 1963); J. LaPalombara, *Bureaucracy and Political Development*, (Princeton University Press, 1963).

² See Max Weber, *The Theory of Social and Economic Organization*, (translated edition by Talcott Parsons through The Free Press, New York, 1947).

³ In Great Britain, the Northcote-Trevelyn Report of 1853 had proposed a merit system for staffing the civil service. The influence of the British report did not take hold in Canada until after Confederation but did serve as a main example for comparison in the numerous inquiries into the Canadian civil service. See J. E. Hodgetts *et. al.* *The Biography of an Institution* (Montreal, McGill-Queen's University Press, 1972) pp. 25-26.

1. Genesis of a Career Public Service

The elimination of patronage in the public service in Canada was accomplished gradually, although patronage was a major public concern at a very early period in Canadian history. With the achievement of responsible government in the 1840's, colonial legislatures sought to oversee and control civil service employment practices.⁴ After Confederation in 1867, however, the executive dominance over the bureaucracy was quickly restored, and the civil service was insulated from Parliament.

A Civil Service Act was passed in 1868 which provided for a system of largely voluntary, simple pass examinations to be administered by a board consisting of the deputy ministers from every department.⁵ In the following years, extensive and repeated inquiries were held to look into the problems and conditions of the civil service. Although an amending Act to the Civil Service Act was passed in 1882, no effective reform in the system took place until 1908, over a quarter of a century later.

The amending Act of 1908 established an independent Civil Service Commission. As a result of this legislation, personnel management was divided between the new non-partisan Commission and the deputy heads of departments. Prior to 1908, Ministers themselves had been actively involved in making appointments to their departments. With the passage of the 1908 Act, managerial authority shifted from the Minister to the deputy head, who shared responsibility with the new Commission for personnel management in his department.⁶

⁴ For example, legislation requiring the publication of the Civil Service List was passed at this time. As Professor Hockin has commented: "When responsible government was achieved in 1848 in the provinces of Canada and Nova Scotia, and soon thereafter in the other provinces, the Assemblies wrested control of the Ministry and patronage from the government. This achievement ushered in a brief period when bureaucratic unity and strength was broken by powerful Assembly committees and by a widespread, though still furtive, spoils system." T. A. Hockin, *Government in Canada* (Toronto, McGraw-Hill, 1976), p. 163.

⁵ For a description of the evolution of civil service hiring practices during this early period, see R. MacGregor Dawson, *The Civil Service of Canada*, (London, 1929).

⁶ As Professor Hodgetts has commented, "Apparently, official policy now assumed that if the Commission could eliminate patronage considerations from the recruitment stage, then the subsequent career of successful candidates could best be guided, in terms of merit and loyal service, by the deputy ministers and their senior assistants. At the same time, a simple flexible scheme of classification and remuneration, modelled on British lines, gave the departmental officials a good deal of elbow room within which they could use their discretion in placing, transferring and promoting staff. However, the break from previous patronage-dominated management practices was far from complete since the bulk of the service—the so-called Outside Service was still subject to the old political rules of the game. With the coming of the First World War even the headquarters' staff tended to the traditional, free and easy democratic methods of recruitment and advancement." *The Canadian Public Service* (Toronto, University of Toronto Press, 1973) p. 266.

The subsequent reforms of 1918 more firmly established the merit principle as the basis of recruitment and selection by refocusing the use of the competitive examinations⁷ and by extending their application to the outside civil service. In addition, the Commission was charged with the responsibility of organizing and classifying the entire civil service.

The role of the Civil Service Commission evolved significantly over the decades from 1918 to 1967. The responsibilities assigned to it in 1918 for organization and classification supported the development of the Commission as a control-oriented central personnel agency often at odds with the Treasury Board Secretariat and deputy heads.⁸ While the control orientation of the Commission was substantially removed in 1967 with amendments to the *Public Service Employment Act* and the *Financial Administration Act* and the passage of the *Public Service Staff Relations Act*, the sharing of responsibility for personnel management with other agencies and the departments has remained a feature of the personnel management system in the public service. This feature will be dealt in greater detail in a later section.

The creation of the Civil Service Commission and its introduction of a merit system for staffing the civil service had an influence as well on recruitment and staffing of top posts.⁹ During the early period after Confederation, senior public officials, for the most part, continued to be patronage appointments. The emphasis on professionalizing the civil service could be seen to have a

⁷ Professor Hodgetts has noted: "Clearly, the most important function given to the the CSC was the administering of civil service appointments by competitive examinations. Both sections 43 and 44 made it clear that the Act contemplated much more than the mere elimination of unfit candidates, as was the case under the old Board of Civil Service Examiners and in the 1908 legislation. This Act prescribes open competitions for all positions, and the compiling of a fixed list of eligibles from which appointments would be made to the civil service in order of standing." J. E. Hodgetts *et. al.*, *The Biography of an Institution*, p. 51.

⁸ The Act of 1918 gave the Commission far-reaching managerial authority over personnel matters. Prior to 1918, the Treasury Board had exercised authority over the central personnel management function (classifications, salaries, etc.) and the Board's control of expenditures acted as a check on the Commission whenever the latter would attempt to extend its control. The attitude and approach of deputies to the Commission's role in the personnel field was also a key variable which contributed to what might be described as a constant shifting of power. As Professor Hodgetts has noted in discussing the 1918 legislation: "But, Parliament went much farther when it also conferred almost complete managerial functions on the Commission, thereby setting up that debilitating competition between its own agency and departmental managers and the Treasury Board which predominated throughout the interwar years. The ancient rivalry between Parliament and the executive over the control of the public service was thus reconfirmed and kept alive by the internal struggle between the Commission as an agent of Parliament, and the departments and the Treasury Board as agents of the executive." *The Canadian Public Service*, p. 274. For a fuller discussion of the interrelationship between the Commission and the departments and board see *Ibid*, Chapters 11 and 12.

⁹ See footnote p. 8.

gradual, but important influence on recruitment into the senior ranks. Undoubtedly a combination of factors led successive Prime Ministers from Laurier to Mackenzie King to look increasingly to the academic and business communities for outstanding candidates for the top posts in the civil service. The recruitment of a number of key senior people appears to have produced a climate in which a professional career civil service took hold.

One might consider the professionalization of the senior ranks of the civil service to have begun with the appointment of Dr. Adam Shortt, who was recruited from Queen's University by Sir Wilfred Laurier to become one of the first Commissioners of the newly-created Civil Service Commission in 1908.¹⁰ Dr. Shortt's efforts to revamp the system of civil service recruitment and selection provided a firm basis upon which subsequent reforms could be made.

Shortt's successor at Queen's, Dr. O. D. Skelton, became the first of a number of deputy ministers who were recruited from academic careers. Following a year as Counsellor in the Department of External Affairs, Dr. Skelton was appointed the Under-Secretary of State for External Affairs, April 1, 1925 by the then Prime Minister, Mackenzie King. The records show that Dr. Skelton became an influential advisor to both Prime Ministers King and Bennett until his death in 1941.

It is purported that Dr. Skelton was responsible for having recommended Dr. Clifford Clark, also of Queen's University, to Prime Minister Bennett. Dr. Clark was appointed in 1932 as

⁹ The main motivation behind the reforms has been noted by Professor Hodgetts who comments: "The major appeal of those who were crusading for the elimination of patronage was that as long as the foregoing practices continued, the civil service could never become efficient. It was the simple equation of patronage with inefficiency—laying all the ills of bureaucratic structures at the door of the "patronage evil"—that provided the clinching argument. Apparently, it never occurred to the reformers that in principle, as well as in practice, one could have an efficient public service with or without patronage . . ." *The Biography of an Institution*, p. 16. It is interesting to note how the patronage-inefficiency equation has persisted to contemporary times. John Porter's analysis summarizes the theory. As he has stated: "Once civil services are free from political control through patronage, it is possible for a new principle of efficiency to be served. It is commonplace to assume that in the modern corporation the need to make profit is a built-in index of efficiency, although this index begins to disappear with the growth of monopoly, restrictive practices and the concentration of economic power. Civil services are not profit-making organizations and consequently have had to find other motivations for and methods of assuring efficiency. The basic method is to search, through independent civil service commissions, for technically competent personnel. Thus competitive examinations for recruitment and promotion are considered likely to produce the most technically qualified people." *The Vertical Mosaic* (Toronto, University of Toronto Press, 1965), p. 419.

¹⁰ The 1908 Act provided for two Commissioners. Ironically, the other appointee was Lt. Col. Michel LaRochelle, a one-time defeated Liberal candidate. See J. E. Hodgetts *et. al*, *The Biography of an Institution*, p. 28.

Deputy Minister of Finance and Secretary of the Treasury Board. His appointment to this post marked the beginning of a small but steady recruitment “stream” of academics who subsequently became situated in senior ranks of the civil service. Mr. R. B. Bryce (Assistant Deputy Minister of Finance and Secretary of the Treasury Board 1947-53, Clerk of the Privy Council 1954-63, and Deputy Minister of Finance 1963-68); Mr. K. W. Taylor (Assistant Deputy Minister of Finance 1947-52, and Deputy Minister of Finance 1956-63), and Dr. John Deutsch (Secretary of the Treasury Board 1953-57), were among the key members of the group generally known as “Clark’s boys” who were recruited to the public service from academic circles in the late 1930’s.

Dr. Skeleton himself established his own recruitment “stream” in the Department of External Affairs of candidates who reached the upper ranks of the public service. Mr. J.W. Pickersgill, Mr. Lester Pearson, Mr. Norman Robertson (Under-Secretary of State for External Affairs in 1941-46 and 1958-60, Clerk of the Privy Council 1949-52); Gordon Robertson (Deputy Minister of Northern Affairs and National Resources 1953-63, Clerk of the Privy Council and Secretary to the Cabinet 1963-74; currently Secretary to the Cabinet for Federal-Provincial Relations); and Hugh Keenleyside (Deputy Minister of Mines and Resources 1947-50, Deputy Minister of Resources and Development 1950-53) were among those who entered by way of competitive examination to the position of Third Secretary, Department of External Affairs.

A third “stream” emerged during the late war and post-war years. These individuals were recruited by the Honourable C.D. Howe, Minister of Reconstruction and Supply to devise and implement post-war reconstruction programs.¹¹ Most of them were engaged to run many of the new public enterprises which Mr. Howe was responsible for creating. Men like Donald Gordon, (Wartime Prices and Trade Board); W.A. Mackintosh, (Department of Reconstruction and Supply); and Maxwell W. Mackenzie,

¹¹ The influence of Dr. Clark, Mr. Bryce and Mr. Mackintosh in the development of reconstruction policy has been well documented. See W. A. Mackintosh, “The White Paper on Employment and Income in its 1945 Setting”, in S.F. Kaliski (ed) *Canadian Economic Policy Since the War* (Canadian Trade Committee, 1965) pp. 9-21; and J.W. Pickersgill, “Bureaucrats and politicians” *Canadian Public Administration* Fall, 1972 Vol. 15, # 3 pp. 410-427. “C.D.’s boys” were mainly dollar a year individuals who were recruited from private enterprise to assist in “getting the job done”. See Peter C. Newman, *The Canadian Establishment* Vol. 1 (Toronto, McClelland & Stewart, 1975) Chapter Ten—“Present at the Creation CD’s Boys”.

(Deputy Minister of Trade and Commerce) are examples of the senior civil servants recruited during this period.

It is a basic element of a career service that opportunities will exist for individuals to reach the highest posts if they have the resources of training, education, physical stamina or whatever it is that is required to get there. The service in turn must provide the opportunities to make the more senior positions available. A key factor contributing to this development should be the existence of an administrative group which is sufficiently competent and sure of itself that it is prepared to guide, encourage and draw out younger officers who have potential and to give them work in line with their capacities. When such a senior cadre exists there will usually be a strong spirit of co-operation throughout the service and a good *esprit de corps*.

The genesis of the career service at the deputy minister level could be said to have been built on a few very good men at the top who recruited capable subordinates, and who sought to draw out strong effective action from them. Little real development of young people had taken place during the depression, either inside or outside the government service. As the senior posts were held by older men, opportunities for advancement were comparatively few. Moreover, the supply of university graduates was small. By the late 1930's, however, the exigencies of economic depression and a war administration created demands for technically competent recruits and helped to provide the opportunities for the university graduates recruited at that time to subsequently reach the senior ranks.

2. Profile of the Deputy Minister Group 1935-77¹²

The composition of the groups of individuals who have held the positions of deputy ministers in charge of departments has been marked by several key characteristics. Some of these characteristics have been relatively constant over the decades; others have

¹² The data for this section have been compiled from the available biographical information on deputy ministers contained in the *Canadian Parliamentary Guides* 1935 to 1967, and other biographical notes. No personal interviews were conducted to supplement the data provided from these sources. The data were assembled for roughly two time periods: an early period 1935-60 and a more recent period 1967 and 1977. They include samples of deputy ministers during the administrations of each of the Prime Ministers who have held office since 1935. The size of the samples was based on the number of deputies in each year selected.

changed. The changes which have occurred reflect evolutionary trends in the kind of career service which has developed at the senior level. By examining brief profiles of the deputy minister group over several decades, it may be possible to ascertain the nature of the evolution which has taken place and then to subsequently examine its causes.

Age

The average age of individuals occupying the position of deputy head of a department from 1935 to 1960 was as follows:

1935	55.6 years
1940	59.8
1945	58.2
1950	52.1
1955	51.1
1960	53.5

There is an interesting pattern here. The average age increases considerably for 1940 and 1945 and then drops back in 1950 and 1955 with a slight increase in 1960. A main explanation for the increase in age in 1940 and 1945 is that most of these deputy ministers had been appointed between 1932 and 1934 and continued in office. It was not at all uncommon for an individual to be the deputy head of a particular department for fifteen years or more.¹³ Secondly, as a result of the Second World War, recruitment to the top posts was from among individuals more senior in years.

The average age of deputies in more recent times has varied moderately. In 1967, the average age of a deputy minister was 54.7 years. In 1977, the average age was 49.8. This is the lowest average age. The general consistency of these figures has been maintained, by and large, by a reasonably balanced distribution of younger and older individuals in the deputy minister group at any one period of time, although there is now a trend to somewhat younger deputies.¹⁴

¹³ Mr. Clifford Clark is a prime example. He was appointed deputy minister of Finance in 1932 and remained in that post until his death in 1953.

¹⁴ The age of individual deputy ministers over these periods has ranged from a low of 32 years to a high of 68 years. The individual ages of deputy ministers have tended to cluster around the 45 to 50 year marks throughout the entire period.

The average age on appointment has also maintained a reasonable consistency. The data are as follows:

1935	47.1 years
1940	47.1
1945	49
1950	46.8
1955	44.9
1960	46.8

In the current decade, the average age on appointment to a position of deputy minister was 48.7 years in 1967 and 45.4 years in 1977. There has been a moderate tendency towards individuals being appointed at a younger age—early to mid-40’s—than during the earlier period, but the overall shift has not been a dramatic one.

Educational Background

The educational background of deputy ministers has gradually but progressively come to include higher percentages of individuals with extensive university training. The following figures set out the basic pattern:

	<u>No Degree</u>	<u>One Degree</u>	<u>Two or More</u>
1935	25.0%	25.0%	50.0%
1945	25.9%	25.9%	48.2%
1955	16.6%	16.6%	66.8%
1967	7.0%	23.0%	70.0%
1977	3.3%	16.7%	80.0%

It is interesting to note that the percentage of individuals holding one or more university degrees increased from roughly 75% in 1935 to 83% in 1955 to over 96% in 1977.

The academic fields in which the degrees have been obtained have shifted to a certain extent. There was and continues to be a combination of individuals with degrees in law and the humanities who might be styled generalists and those with specialized degrees which, during the early period, related to their respective departmental responsibilities,¹⁵ or, more recently, to specialized functional disciplines.

¹⁵ For example the description offered of George S. Barton, C.M.G., B.S.A., D.Sc.A., deputy minister of Agriculture from 1932-49 reads in part: “Identified with agriculture all his life”.

Training in economics has been a notable feature in the educational backgrounds of a significant number of individuals in the senior cadre. The impact of Keynesian economics on government policies and programs might be considered both the cause and result of the pattern of university recruitment in the late 1930's and early 1940's.¹⁶ Thus, while there has always been a small core of economists in the senior ranks, representation of this and related disciplines has become more pronounced in recent years. In 1967 and 1977, social and management sciences and economics were the dominant disciplines represented in the samples.

In representative terms, the Canadian institutions at which deputy ministers have obtained most of their education has been significantly broadened.¹⁷ The University of Toronto has consistently led the list of universities from which members of the deputy minister group have obtained at least one degree. In 1935, for example, roughly 31% of the group in that year had at least one degree from the University of Toronto; in 1977, the percentage was roughly 37%.

In addition to the University of Toronto, the main Canadian institutions from which members of the deputy minister group in 1935, 1945, and 1955 obtained at least one degree included Queen's University, University of Manitoba, McGill, Dalhousie, McMaster, University of Saskatchewan and Laval. In 1967 and 1977 the institutions represented included, in addition to those listed above, the University of Alberta, University of Western Ontario, University of Montreal, Carleton and the University of Ottawa. One might surmise on the basis of this evidence that as university recruitment policy for entrance to the public service generally has been broadened to include all major universities in Canada, this trend has also come to be reflected in the educational backgrounds of deputy ministers.

¹⁶ A major expression of Keynesian economic philosophy as reflected in the White Paper on Employment and Price Stability of 1945 for example, was the work of a few senior officials such as Mr. Robert Bryce, Mr. W. A. Mackintosh and Mr. Wynne Plumptre who had entered the public service during this period.

¹⁷ The data here deals only with Canadian universities. The foreign universities which deputies have attended have included Oxford, Harvard, Cambridge, MIT, University of Chicago, London School of Economics, University of California and the University of Minnesota, roughly in that order of importance. The percentage of individuals in the deputy minister group who have pursued graduate studies abroad has consistently been thirty percent or less in any one period.

Previous Work Experience

The number of deputy ministers represented in each of the samples from 1935 to 1977 who may be considered as career civil servants has increased significantly over this period. The main sources of recruitment from outside the public service¹⁸ in the main has included: universities; legal and medical practices and private business; the armed services¹⁹ and provincial governments. The following data provides a comparative breakdown of recruitment sources during the period examined:

	<u>1935</u>	<u>1945</u>	<u>1955</u>	<u>1967</u>	<u>1977</u>
Career Civil Servants	43.75%	33.3%	45.8%	73.0%	70.0%
University	25.0%	7.4%	—	—	6.7%
Law, Medicine, Private Business	12.5%	33.3%	25.0%	17.0%	10.0%
Armed Services	18.75%	18.5%	25.0%	3.0%	—
Provincial Governments	—	7.5%	4.2%	7.0%	13.3%
Total Number of Deputies	16	27	24	30	30

As the figures show, the recruitment of individuals from university careers has declined significantly. Recruitment from provincial civil services, on the other hand, has increased overall. The most striking statistic is the current percentage of individuals in deputy minister positions who have spent their entire working careers in the federal public service.

Another noteworthy characteristic of the composition of the deputy minister group pertains to the number of individuals who started their careers in the Department of External Affairs. The percentage of individuals in terms of the total group has been small²⁰ but significant in that this particular department which has over the years developed an internal career system for its own officers has also been a source of recruitment for deputy ministers across the service as a whole.

¹⁸ The “career civil servant” category includes those deputies whose total work experience was or has been in the federal public service. “Outsiders” have been defined as individuals who had worked for several years in another employment sector and who joined the public service at an intermediate level as well as those who had established careers outside government and were appointed directly to the level of deputy minister.

¹⁹ The military category was considered to include individuals who had entered the services as junior recruits, had reached officer rank and had served several years at that level. Individuals who had only military training or brief military service were not included in the category.

²⁰ The largest representation of former External Affairs Officers is reflected in the 1977 sample in which six of the current thirty deputy ministers started their careers in the Department of External Affairs. The figures for earlier years, however, do not provide any distinct trends in this regard.

Ethnic Background

The senior ranks of the public service have not until the last decade, been representative of the two official language groups in the country as a whole. From 1935-60, the top ranks were dominated by anglophones who, for the most part, had been born in the province of Ontario. In the 1967 and 1977 samples roughly one quarter of the deputy ministers spoke French as their mother tongue. The changing pattern of francophone representation might be related to the changes in attitudes in the public service and to the recruitment policy initiated during the 1960's to attract francophones to the Federal Public Service.

3. A Career Service—Past and Present

The development of the deputy minister group has, over the past forty odd years, gone through several stages. The genesis of a career service for deputy ministers has been identified with a small group of senior administrators who were responsible for recruiting university graduates, for the most part, into junior officer positions during the late 1930's and early 1940's. The expansion of the civil service during the war years combined with the impact of Keynesian economics on post war reconstruction plans of the government provided opportunities for many of these recruits to advance to senior posts in the public service. These developments also allowed the entrenchment of a technically competent career-oriented senior cadre in the public service.

The evolution of the deputy minister group over the period studied has resulted, on the average, in an increasingly younger group of senior officials who have higher formal educational qualifications, and who are career civil servants. The composition of the present group of deputies reflects a broader representation of recruitment bases both in terms of educational institutions and other jurisdictions, and of the two official language groups.

²¹ See J. E. Hodgetts, *et al The Biography of an Institution*, pp. 473-482.

In the past, there have been critics of the number of “outsiders” appointed to the senior ranks of the public service²², and to a certain extent the criticism was valid during the early period as the data set out above indicates. By contrast, the profiles of the deputy minister group in 1967 and 1977 bear witness to a highly developed career service in which over seventy per cent of individuals in the senior posts have spent their entire working lives in the federal public service. The continued recruitment of a small percentage of “outsiders” has been mentioned, however, and is regarded as desirable on the grounds that it can add balance to the deputy minister group. The occasional recruitment of outsiders prevent the senior ranks of the public service from becoming closed to senior people in other fields and jurisdictions. This does not in any way detrimentally affect the internal career system, as the recruitment of individuals from other jurisdictions serves to maintain the vitality of the senior public service ranks and to reinforce their collective efforts by increasing the range of knowledge and experience which can be brought to the making of major decisions and policies. Finally, it may also be necessary from time to time to recruit outsiders to maintain the representative character of the public service at the top levels.

A major distinction which may be drawn between the deputy minister groups of the earlier period (1935-1960) and the more recent period (1967 and 1977) pertains to the career paths of individual deputies and the structure of the career service itself. The distinguishing features of the early period reflected the traditional nature of the public service. A deputy spent most, if not all, of his career in one department. Promotions were made on the basis of seniority. There was a general acceptance of this practice

²² In 1946, for example, the Report of the Royal Commission on Administrative Classifications in the Public Service contained this comment: “It is significant that a substantial proportion of the deputy ministers and other principal officers have been appointed to their present positions from outside the service. The truth is that the Canadian Civil Service as presently organized and managed, does not provide its own leadership.” Canada, Royal Commission on Administrative Classification in the Public Service, *Report* (Ottawa, King’s Printer, 1946), p. 15. In 1960, John Deutsch offered the following commentary in a similar line, “I think it is apparent that over the years the service has not produced its own leaders in adequate numbers. I know there are many exceptions which prove this rule, but far too often the personnel required for senior positions is not found within the service, and is obtained from outside. I know that part of the reason is to be found in the rapid expansion of the service, but that is not the whole story . . . in this period of rapid economic growth when there is a universal shortage of executive and administrative capacity, the service cannot continue to scrounge on the rest of the community for the required supply of talent. It will have to make its own appropriate contribution.” J. Deutsch; “Some Thoughts on the Public Service”, J. E. Hodgetts and D. E. Corbett *Canadian Public Administration*, (Toronto, MacMillan, 1960) p. 299-300.

by individuals who were often passed over as a result of it. Finally, the structure of the civil service was organized along the traditional lines of division of responsibility by purpose, location and/or clientele. New policies and programs were tacked on to the existing structures.²³ Restructuring government departments was not considered or used as a means for effecting changes in government policies or programs.

In the last ten to fifteen years there have been considerable changes in these respects. The current practice of rotating deputy ministers among departments as a means of broadening their experience is an integral part of the present career planning process. Moreover, the changes in government organization and structure during the 1960's as a response to an increasingly complex technological society and increased public demands for new government initiatives has contributed in large measure to exposing individual deputy ministers to a variety of roles and responsibilities. This has been reflected in the nature of the current career service. The following section will examine the nature and the extent of these changes and the impact that they have had on the senior ranks of the public service.

²³ See J. E. Hodgetts, *The Canadian Public Service*, pp. 87-136 for a discussion of the evolution of departmental structures in the federal public service.

III

RECENT CHANGES IN THE PUBLIC SERVICE

By its very nature, the federal public service is subject to pressures which find expression through the political process, and which are reflected ultimately in administrative forms. The main influences which have shaped the federal service have included the size and diversity of Canada, its two major language groups and the workings of the federal system itself.¹ Major crises such as war and economic depression and, more recently, the development of an increasingly sophisticated welfare state and the emergence of a “conservator society” ethic, have also served to shape the organizational forms which governments have developed to respond to the needs of society.

These influences have often been the cause of spurts of growth in the public service. There have been periods in the history of the public service in which it has undergone rapid expansion and, at times, contraction in its numbers. For example, the service numbered approximately 25,000 in 1914. As a result of the war effort, this number had doubled by 1920, but fell to slightly less than 40,000 in 1924. By 1931, the number had increased to 46,000. During the depression the number was reduced to some 41,000 but, by 1939, had again risen to 46,000. The service almost trebled during the Second World War; approximately 117,000 people were reported to have been employed in departments and noncommercial agencies in 1946. In 1960, the Glassco Commission reported that there were 132,000 civil servants employed under the *Civil Service Act*. This number had risen to 199,700 in 1969. By 1976,

¹ Canada, Royal Commission on Government Organization *Report*, (Ottawa, Queen's Printers, 1962.) Vol. 1, pp. 26-30.

the number of individuals employed under the *Public Service Employment Act* had risen to 283,000.

The management of an organization the size of the Government of Canada has, over the years, required changes and reforms to more closely link the organization and its several parts to changing government needs and priorities. Until the 1960's growth and innovation were accommodated within the traditional departmental structures and by traditional management systems. The 1960's, however, opened a new era and indeed introduced a new orientation for governmental affairs. The Report of the Glassco Commission acted as a catalyst for many of the changes which were implemented during this period. These changes have had a major impact on the role and responsibilities of deputy ministers.

1. Restructuring of Government in the 1960's

The Report of the Royal Commission on Government Organization of 1962 contained the following observation:

In the century of rapid and continuous growth since the framework of the Canadian government was settled, economic and social changes have created new public wants that have affected governments everywhere. At the same time, new resources have become available to meet public needs. The resulting action by government has both influenced the direction of Canadian developments and accelerated its pace. In the process, the role of government and the character of its activities have changed radically. But there has been a marked lag in the adjustment of concepts and processes of public administration to the changing circumstances.²

The political climate which existed when the Glassco study and recommendations were received by the government of the day was ripe for change. In the first instance, the business of government had become increasingly oriented towards service functions through which governments provided service either in cash or kind to individuals or to the community. Secondly, government had come to assume a much more positive and creative task than was formerly the case. The attitude that governments exist not only to regulate but to assist and to promote the development of the

² *Ibid.* Vol. I, p. 35. In certain respects this observation is not a surprising one. The Glassco study was the first major review of government organization since the Murray Commission of 1912.

country's affairs had become more pronounced. Thirdly, the emphasis which had been placed during the war and post-war years on the need for technological and scientific expertise in developing Canada's resources continued into the sixties and, as exemplified in the Glassco Report, a high premium was placed on technical efficiency and competence to deal with the problems of an increasingly complex technological society. Finally, public awareness of and public interest in the affairs of government created an environment in which more open and more responsive administration was demanded. At the political level, the response was made largely by reordering the government's priorities and by restructuring governmental functions in a complementary way.

Three main government reorganization bills were passed in the late 1960's. The Acts of 1966 and 1969 provided for the reorganization of nearly twenty major areas of government activity and, with the passage of the Government Organization Act of 1970, a number of new areas of public interest found structural expression.³ In addition, new legislation was passed in the area of personnel management and employer-employee-relations which had a significant impact on the organization of the personnel management function across the public service.⁴

The process of economic specialization had led to a refinement of activities of government and had given rise to the need for a refocusing and, hence, reorganization of departmental forms. number of government departments which have a significant economic impact has doubled in the last fifteen years. The reorganizations also represented a shift from the traditional civil service approach in which problems and issues tended to be dealt with in a reactive fashion, to a more responsive and pro-active posture on the part of the government to public policy concerns. The influence of keynesian economics found full expression in structures designed to support the active intervention of the state in the economy.

A higher level of public awareness of governmental processes required Ministers to participate more actively in initiating new

³ Government Organization Act, 1966, *Statutes of Canada* 14-15 Eliz. II Ch. 25; Government Organization Act, 1969, *Statutes of Canada* 17-18 Eliz. II, Ch. 28; Government Organization Act, 1970, *Statutes of Canada*, 19-20 Eliz. II Ch. 42.

⁴ Two new bills were passed: The Public Service Employment Act 1966-67, *Statutes of Canada* 14-15 Eliz. II, Ch. 71 the Public Service Staff Relations Act, 1966-67, *Statutes of Canada* 14-15 Eliz. II, Ch. 72 and a third, the Financial Administration Act, *Revised Statutes of Canada*, Ch. 116 was amended conferring new responsibilities for personnel on the Treasury Board.

policies and programs. They were able to meet public demands for new programs and services through the use of public service resources. New organizations and agencies were established and operated—not least in Cabinet and a new Cabinet committee system—in ways intended to more actively achieve public policy goals and objectives.

Hence, the departmental reorganizations sharpened the policy focus of governmental activities. Branches and divisions of existing departments were regrouped and refashioned in line with current public policy concerns. The departmental titles reflected the new and emerging orientations: Manpower and Immigration; Indian Affairs and Northern Development; Energy, Mines and Resources; Industry, Trade and Commerce; Regional Economic Expansion; Consumer and Corporate Affairs; Communications; and, Environment. Although the changes were extensive, they consisted, by and large, of using existing structures as the basis for a new ordering of political priorities.

Some of the new structures which emerged during this period included a number of advisory bodies such as the Medical Research Council and the Science Council of Canada⁵ and a number of regulatory agencies such as the Canadian Radio-television and Telecommunications Commission. In addition, an innovative concept in government organizational design was introduced in 1971 with the creation of the Ministries of State for Science and Technology and Urban Affairs. Their basic design is that of policy coordination agencies which carry no program responsibilities.

During this period, changes were also made in the central management of the public service. The Glassco theme of “let the managers manage” required reform of the central management processes. A new Cabinet position of President of the Treasury Board and a new deputy ministerial post of Secretary of the Treasury Board were created. The Treasury Board Secretariat, formerly a division of the Department of Finance, was removed from the department and established as the central co-ordinating agency and management arm of the executive, with its own Minister and deputy.

⁵ The Economic Council had been created earlier, in 1964.

Amendments were made to the Financial Administration Act, which served to reinforce the role of the Treasury Board in setting management standards and developing management policies for the public service.⁶ In particular, the Board was assigned responsibility for “personnel management in the public service, including the determination of terms and conditions of employment of persons employed therein”.⁷ With the passage of the *Public Service Staff Relations Act*, which set out a comprehensive scheme for collective bargaining in the public service, the Treasury Board also assumed the role of acting as the agent of the government in employer-employee relations. Thus, the Treasury Board Secretariat became a key actor in the personnel management system of the public service.

The Civil Service Commission, for its part, was reconstituted under the *Public Service Employment Act* as the Public Service Commission. Having been relieved of its responsibilities for determining rates of pay and conditions of employment, classification and organization, which were assumed by the Treasury Board Secretariat, the Commission was now expected to concentrate on its basic role as an independent staffing agency charged by Parliament to act as a guardian of the merit principle. The Commission’s activities were to be reoriented to placing greater emphasis on providing support to deputy heads in the staffing and training of employees.⁸ These functions took on added significance after 1969 when the *Official Languages Act* was passed.

Overall, these organizational changes resulted in a significant reorientation in the work of the deputy minister. The changes in the departmental structures have added new dimensions to the policy role of senior public servants. The restructuring of the central management functions, particularly in the area of the personnel management, has required a realignment of the relationships between departments, the Treasury Board Secretariat and the Public Service Commission.

⁶ For a discussion of the role and responsibilities of the Treasury Board and its Secretariat, see Submission 1.

⁷ *Financial Administration Act*, Section 5(1) (e).

⁸ The Glassco Report commented in the following way on the system which had developed over the years: “Much of the structure and the practice of personnel management in the civil service is a direct product of the principle that there should be uniformity of treatment for civil servants. To ensure this uniformity, centralized and detailed control has been imposed. The paradoxical result has been that concern for the individual has led to a highly impersonal machinery of administration.” Vol. 1. p. 246.

2. The Policy Role of Deputy Ministers

As the senior policy advisers in departments, deputy ministers are expected to provide support to their respective Ministers in the formulation and development of the department's and the government's policies and programs. This role is a key aspect of the relationship between a Minister and his deputy, and is the basis upon which they share responsibility. As Lord Bridges has commented:

Over the whole field of Government activities the work of Government at any given moment of time is being carried on in accord with policy decisions or directions given by Ministers, at some date in the past. The time comes when these former policy decisions need renewal, nearly always in a rather different form. This may be the result of slow changes in social habits, or economic conditions, or it may come about from the sudden pressure of events, which makes it obvious that some existing line of policy can no longer be made to work, or has ceased to be acceptable to public opinion. I believe that today most of the work of Ministers and their senior staffs is concerned with the continuous task of keeping the policies of departments in line with the needs of the day: changing what is becoming out-of-date, or looking ahead and attempting to forecast the changes which will have to be carried out in the ensuing months or years.⁹

Departmental administration is an inherent part of government policy.¹⁰ The deputy's responsibilities for the management of his department presumes that he is the chief administrative head. It is widely accepted that a Minister should not be expected to try to be involved in the purely administrative aspects of his department, but the deputy must be involved in both policy and administrative activities. Policy cannot be formed, and the measures to give it effect cannot be determined without the knowledge and experience which the department possesses. At the same time, the department is dependent in executing policy on continuous guidance, direction and authority from the Minister. The continuing dialogue between the Minister and his deputy provides the basis of

⁹ *The Right Hon. Lord Bridges, "The Relationship between Minister and the Permanent Departmental Head", in *Canadian Public Administration* V. viii, #3, 1964, pp. 271-2.

¹⁰ There is no satisfactory definition of policy or policy-making. While it may be distinguished in nature from purely administrative tasks, there is often a strong reciprocal relationship between policy and administration that such distinction at the most senior levels often becomes futile. With respect to the public service, what seems to have transpired in recent years is a shift of emphasis from the administration to the policy behind public service.

what could be described as a reciprocal relationship. As Bridges states:

The knowledge, the experience, the acquired skill which the Minister brings to his duties differ from those of the Permanent Head. This contrast is not only one of the chief characteristics of the partnership . . . it is one of the sources of its strength since the experience and outlook of the partners is complementary.¹¹

And yet the legal and constitutional principles of this relationship are quite clear. The powers of the Department are vested by law in the Minister, who is constitutionally responsible to Parliament and the public. The deputy's authority in substantive departmental matters is delegated from the Minister, and hence the deputy is responsible to him. Policy may be developed jointly, but it is the Minister who makes the final decision. In turn, the Minister must obtain the approval of his Cabinet colleagues. The individual and collective responsibility of the Minister is thus exercised.

The deputy minister also has to support the collective responsibility of his Minister for government policy and programs. This is demonstrably expressed by the appointment of deputies by the Prime Minister. The Prime Minister must be able to promote consensus among his colleagues; deputies assist this process by ensuring that proposals made to Ministers are ones which have the support of their colleagues in the public service.¹²

A major feature of the organizational changes which took place in the public service in the 1960's was that deputies were often, upon appointment, given the responsibility or mandate for effecting the restructuring. Organization and personnel, the key elements of a deputy's administrative responsibility, were considered to be major instruments for revamping old policies and evolving and creating new ones. The processes involved in restruc-

¹¹ *Op. cit.* p. 270. Jack Pickersgill in commenting on his own experience has said: "The first conclusion is that there is nothing very new about the participation of bureaucrats in policy-making; it was at least as prevalent in 1937 as it is in 1972. Secondly, bureaucrats who are mere administrators are not likely to be good administrators. Unless an administrator understands the policy he is administering he cannot do an effective job. If he does understand the policy, he will find imperfections which should be corrected and improvements which should be made. If he reports his views and suggests modifications to his political superior, he is seeking to make a new policy or, at least, to change existing policy. The third conclusion is that government policies cannot be made in a vacuum or as if there was no yesterday . . . changes in policy should, therefore, be based on experience in which the outside impressions of politicians need to be complemented by the inside knowledge of bureaucrats." "Bureaucrats and Politicians", *Canadian Public Administration*, Vol. 15#, 1972, p. 426.

¹² For a discussion of the relationship between the deputy and the ministry, see Submission 1.

turing increased the responsibility of the deputy and often required of him a new style of management or indeed a new role. Not only did the nature of the organizational changes give formal recognition to the need for a greater degree of coordination between and among federal departments and agencies, concerted collegial action was required to give effect to the reorganizations themselves.

The implications that these developments have had for the role of the deputy are significant. The traditional anonymity of the deputy minister has gradually been removed as he has developed a much higher public profile as the head of a department.¹³ This has come about for several reasons.

As demands on Ministers' time have increased, greater demands are made on deputies to become more actively involved in policy making. The size of the Ministry has experienced comparatively small growth in comparison with that of the public service, for example, and yet the number and range of responsibilities which have been placed on Ministers has increased substantially. It is not surprising, therefore, that Ministers have increasingly delegated and shared their responsibilities with their deputy heads.

In attempting to provide a policy focus for a department and to establish a basis for the definition and development over time of broad policy objectives for a particular department or agency, deputy ministers have often been cast in the role of policy advocates when effecting organizational change or developing new policies and programs. The complexity and interdependence of an increasingly larger number of public issues has acted to broaden significantly the scope of a single department's affairs. Before presenting a proposal to his Minister, a deputy must ensure that he has the support of his peers in other departments and agencies and, often, other levels of government. He must be able to persuade them of the efficacy of his department's proposals and, on some

¹³ This is by no means a strictly Canadian phenomenon. In 1968, the Fulton Committee on the Civil Service in Great Britain made the following comment in its Report: "This convention (civil service anonymity) has depended in the past on the assumption that the doctrine of ministerial responsibility means that a Minister has full detailed knowledge and control of all the activities of his department. This assumption is no longer tenable. The Minister and his junior Ministers cannot know all that is going on in his department, nor can they now-a-days be present at every forum where legitimate questions are raised about its activities. The consequence is that some of these questions go unanswered. In our view, therefore, the convention of anonymity should be modified and civil servants, as professional administrators, should be able to go further than now in explaining what their departments are doing, at any rate so far as concerns managing existing policies and implementing legislation." "The Civil Service", Vol. 1, Report of the Committee chaired by Lord Fulton, 1966-68, (London, H.M.S.O., June 1968) Cmd. #3638, page 93.

occasions, may be required to identify himself with a particular policy. He must also, in the process of consulting and co-ordinating, act as a buffer for his Minister and for officials, and ensure that his Minister is not subject to criticism as a result of his department's activities.

As a result, it is hardly surprising that the suggestion has sometimes been made that deputies have been partisan in the exercise of their responsibilities. Their close identification with the policies of a department has been misconstrued from time to time as an active political role; this higher profile has even on occasion led to their being used as avenues for attacks upon the Ministers they serve. These tendencies, always latent, are likely to be somewhat increased when a government has been in power for a number of years and the majority of deputy ministers have been appointed during that period. The fact is that while deputies in recent years have been required to be more actively involved in the processes of policy-making, the principles governing their role, both as public servants and as political advisers, have remained constant. As a technically competent career-oriented senior cadre in the public service has matured and become more broadly rooted, the observation of these principles by deputies has if anything become more punctilious. Nonetheless, it remains the duty of the deputy to be the servant of the executive and it is incumbent upon him to provide support to whatever government the electorate gives him.

These developments have added greatly to the pressures of the jobs of deputy ministers. As the deputy's policy role becomes more visible he is more closely linked to, and hence, more accountable to, his Minister in this regard. At the same time, he has become more remote as his departmental mandate has broadened and as his dependence upon the collegial action of his peers to serve both his Minister and the interests of the public service as a whole has increased. The prevalence of top level interdepartmental committees, and the elaborate intergovernmental structures which have been built up at the official level over the last ten to fifteen years bear witness to the high premium on and the need for collegial action by the senior ranks of the public service.¹⁴ Concomitantly, the increased demands placed on a deputy's time as a result of the extensive consultative processes respecting policy-making have

¹⁴ It is also reflected in the Cabinet committee structure.

required him to increasingly delegate responsibility for administering the department to his assistant deputy ministers. The changing context within which the deputy must perform his functions, and the accelerated pace of activity in government, have thus served to broaden the scope and increase the burdens of Office for deputies while at the same time blurring the public's perception of the lines of accountability between the Minister and his deputy that have nevertheless continued to govern the system.

3. Personnel Management and Deputy Ministers

The legislation passed in 1967 provided for a new division of responsibility between departments, the Treasury Board Secretariat and the Public Service Commission for personnel management in the public service. The principal objectives of these changes were to provide deputy ministers with greater freedom and flexibility in the management of human resources in their respective departments and to vest the Treasury Board Secretariat with those managerial responsibilities requiring centralized coordination and development. Greater emphasis was to be placed on the management of people as an inherent part of total management and on the active involvement of the deputy head in the process of personnel management.

As deputies have come to play a larger role in this area of management there have been increased efforts on the part of central management as well as the Public Service Commission to ensure that a balance is maintained between individual departmental interests and the interests of the service as a whole. However, the rapid growth of the public service in the last decade and the introduction of collective bargaining and bilingual requirements for public service positions have contributed to creating strains on the maintenance of an equitable balance of interests. As a result, deputy heads have to work within a rather complex system of methods, procedures, rules and provisions for most aspects of personnel administration.

The substance of personnel management covers a large number of areas including such matters as recruitment and selection; job classification and compensation administration; manpower utilization; training and development; collective bargaining and

consultation with employee representatives; individual performance evaluation; standards of conduct; discipline; dismissal and release; the redress of grievances; and the counselling of employees. While deputy ministers have the primary responsibility for the day to day exercise of these functions, they do not have any exclusive legislative authority for them. In every area, the deputy is required to work in partnership with either the Public Service Commission or the Treasury Board Secretariat or both.

The Public Service Commission has remained an integral part of the personnel management system. Its statutory mandate is that of an independent agent of Parliament. As the guardian of the merit principle, it is independent and separate from the executive branch. It is, nevertheless, a central staffing agency responsible for the service as a whole and as such has certain functions of a managerial nature. The Commission is charged with three vital personnel management functions: recruitment, selection and appointment over which it has final authority since it hears appeals against its own decisions and the statute provides for no further appeal. In addition Section 5(b) of the *Public Service Employment Act* assigns the Commission the duty “to operate and assist deputy heads in the operation of staff training and development programs in the public service.” These programs include language training and are usually initiated at the request of Treasury Board and departments.

Thus, while the statutory basis of the Commission provides for a substantial degree of independence from the executive branch, it does nevertheless, have certain responsibilities which require it to be sensitive and responsive to managerial needs throughout the public service. The Commission is, therefore, required to work in co-operation with the Treasury Board Secretariat and with deputy ministers and their officials in supporting personnel management practices. At the same time, it must exercise objectivity and neutrality in the application of the merit principle and the operation of the merit system.

In practice, deputy ministers share their responsibilities with the Commission and the Treasury Board. In the area of staffing, responsibility is, with the exception of the most senior levels, delegated to deputies from the Public Service Commission.¹⁵ The

¹⁵ The delegation of staffing authority from the Commission to deputy heads had been started some years before the 1967 legislative changes and had been accompanied by the creation of a decentralized personnel structure throughout departments and agencies. The statutory base for delegation by the Commission to deputy heads for staffing is found in Section 6 of the *Public Service Employment Act*.

exercise of this authority by departments must, nevertheless, be undertaken within the provisions of the *Public Service Employment Act* and regulations promulgated pursuant to it. Another example in an area related to staffing where there is considerable delegation is job classification and compensation administration. The department is subject to guidelines set by the Treasury Board where authority for these functions is vested and must develop its requirements jointly with officers of the Treasury Board Secretariat.

In the area of collective bargaining, the deputy's ability to manage his manpower resources is strictly limited. Bargaining units are certified by the Public Service Staff Relations Board across the service as a whole. The bargaining process is conducted by the Treasury Board Secretariat as the agent for the employer. In the event of an employer-employee dispute in his department, a deputy may be placed in a very difficult position due to his lack of authority to take action on behalf of the government in these circumstances.

In every functional area in the personnel management system, the deputy head is required to work in conjunction with at least one other agency. In no instance does the deputy head have a statutory mandate for any element of the personnel management system. The present system places managerial responsibility with deputies and yet managerial authority is vested in either the Treasury Board or the Public Service Commission. While the Commission has a role to play in personnel management in defense of the merit principle and the Treasury Board has a role to play in the allocation of resources, the deputy minister must have the necessary authority commensurate with his responsibilities. His accountability to his Minister and to the public service as a whole is based on his performance which, in large part, is a function of his ability to recruit and motivate people to do the tasks required. The protection of the probity of the staffing process and the interests of coordinated central management should be properly balanced against the deputy's need to manage his own resources and to be held accountable for them.

IV

PERFORMANCE ASSESSMENT IN THE CONTEMPORARY CONTEXT

As discussed elsewhere,¹ deputy ministerial responsibilities are directly related to the individual and collective responsibilities of Ministers. While the implications of individual responsibility in the system have been seemingly well understood, the significance of collective responsibility as it affects deputy heads has not been fully exposed. On the one hand, the deputy minister owes his first loyalty to his Minister to whom he is responsible and, hence, accountable. On the other hand, a deputy minister is appointed by the Prime Minister in consultation with the Minister whom he serves. He is often required to develop policy proposals in conjunction with his peers. He is also subject to centrally prescribed standards for the management functions in his department—allocation of program funds, financial administration, classification, staffing, etc. In this sense he is responsible for effective management in the system as a whole and, therefore, as a group, deputy ministers have a collective responsibility to the Prime Minister and his Cabinet colleagues for the operation of the public service. His accountability for the management of the public service as a whole is demonstrated by the fact that it is the Prime Minister who recommends to the Governor in Council his appointment or removal from office.

The present size of the public service and the concomitant need for ensuring effective coordination of government activities emphasizes increasingly the collective responsibilities of deputy heads, although their individual responsibilities, of course, remain paramount. Developing an appropriate management system and

¹ See Submission 1.

establishing an effective performance assessment process for deputy heads which is based on the individual and collective responsibilities they support is central to the issue of their accountability.

1. Management of the Deputy Minister Group

The management and evaluation of the deputy minister group is a relatively recent concern. From the point of view of compensation, the group of public service executives appointed by the Governor in Council were traditionally governed by quite different processes than those applied to the group of public service executives appointed by the Civil Service Commission.²

The “public service” group had a relatively well-defined pay structure, based on the classification process established for the public service and rates of pay fixed at regular intervals by the Treasury Board (until 1967 on the basis of recommendations made by the Civil Service Commission). The Governor in Council group had a relatively ill-defined pay structure, unaffected by a classification process of any kind, and rates of pay fixed at irregular intervals by the Governor in Council, normally on the basis of recommendations made by the Secretary to the Cabinet after consultation with those of his colleagues concerned. The pay structure was reasonably clear insofar as it related to the deputy ministers who were and continue to be paid at one of three levels. The salary structure was reviewed periodically³ and adjusted in accordance with the views of a few senior officials and approval of Cabinet.

With the advent of collective bargaining, attention was turned to establishing a systematic approach to compensation for public service executives, both those appointed by the Governor in Council and those appointed through the Public Service Commission. The creation of the Advisory Group on Executive Compensation in the Public Service followed a recommendation of the Joint House

² Only the position of deputy minister and in the case of a few departments such as Justice and Defence, associate deputy ministers, are appointed by the Governor in Council. Appointments to the positions of assistant deputy ministers, directors general, and directors etc. are handled by the Public Service Commission and are thus considered part of the public service proper.

³ The Royal Commission on Administrative Classification in the Public Service in 1946 dealt with scales of pay for deputy ministers. In 1955, Walter Gordon of Woods and Company was contracted to do a consultant's study on the question.

of Commons—Senate Committee on Employer-Employee Relations in 1967. In announcing the government's intention to act upon the recommendation, Mr. Benson, the then President of the Treasury Board described the terms of reference of the Advisory Group:

to make recommendations from time to time on the rates of pay and conditions of employment of executive personnel in the public service; and the principles that should govern determination of the rates of pay and conditions of employment of other public servants employed in a managerial or confidential capacity.⁴

In its first report, the Advisory Group members⁵ took note of the hitherto unidentified Governor in Council group and recognized its essential differences from the classified public service. A six-level salary and classification structure (SX/DM) framework which would be common to both the executive ranks in the classified public service and the bulk of the Governor in Council group was proposed. The key element with respect to the proposed salary administration scheme was the recommendation that pay increases should be based on performance assessment.

The Advisory Group also recommended in its first report that new machinery be established to deal with the GC group. To this end, it proposed that a Committee of Senior Officials be set up:

to advise the Governor in Council at least once a year on matters relating to administration of the proposed structure of executive salaries and, more particularly, on the allocation of GC positions to specific levels and on the placement of individuals occupying such positions at particular salary rates within the relevant ranges.⁶

It was the Advisory Group's view that only a group of Senior Officials would have the opportunity, on a regular basis, to form judgements on the relative value of positions and the relative performance of individuals. For all individual cases, as noted above, the Advisory Group stressed that there should be nothing automatic about the progression through a salary range, and that individuals should move from one rate to another within a particular range only where there was evidence that high standards of performance were being met and maintained.

⁴ Press Release, Office of the President of the Treasury Board, September 13, 1967.

⁵ The original members were Mr. J. C. Clyne (Chairman) Dr. Roger Gaudry, Dr. John Deutsch, Mr. Allen Lambert and Mr. Maurice Vincent.

⁶ First Report of the Advisory Group on Executive Compensation in the Public Service, p. 9.

The Committee of Senior Officials on Executive Personnel was created in 1969. Its original membership included three permanent members (Secretary to the Cabinet, the Secretary of the Treasury Board and the Chairman of the Public Service Commission) and to offset any central agency bias, three other members chosen by the Prime Minister by rotation from among other Deputy Ministers for a term of three years.⁷ At the present time the Secretary to the Cabinet for Federal Provincial Relations chairs COSO (Personnel) and another rotational deputy minister has been added.

This Committee had, in the first instance, to undertake three tasks: the preliminary “slotting” of deputy minister and other GC positions; the establishment of a salary structure which would link the slotted classification and the SX/DM salary structure; and, finally, the establishment of a performance evaluation process for all candidates.

To assist the work of the Committee in its initial slotting exercise, the Treasury Board Secretariat with the assistance of the consulting firm of Hickling-Johnston, Ltd. examined the question of reclassification of the Governor in Council group and made recommendations to the Committee on developing the slotting and salary structure of GC positions. Consideration was also given to the establishment of a secretariat to serve the Advisory Group on Executive Compensation in the Public Service, and to handle all matters including appointments respecting the Governor in Council group. In 1969, the Senior Personnel Secretariat was created in the Privy Council Office for these purposes.

During the period of the departmental reorganizations in 1966 and 1969, an ad hoc Cabinet committee on the Public Service had considered the several reorganizational proposals and occasionally the senior personnel issues created by the reorganizations. With the revamping of the Cabinet committee structure in 1968 and, more particularly, with the creation of the Committee of Senior Officials on Executive Personnel in 1969, this Cabinet committee on the Public Service began to meet on a more formal and systematic basis than it had previously. Its agenda regarding

⁷ A Committee of Senior Officials on Government Organization had been in existence some years before this and had been involved with the 1966 departmental reorganization. This Committee consists at present of the same core group as the Committee on Executive Personnel, but is chaired by the Secretary to the Cabinet. It also includes those other deputy ministers who may be concerned with the matter under discussion.

senior personnel now revolves around the several management issues for the Governor in Council group: classification, performance review and salary administration. This committee, a very important innovation of the last ten years, is chaired by the Prime Minister.

The focal point for the general management of the GC group, therefore, has become the Committee of Senior Officials on Executive Personnel and the Cabinet committee on the Public Service which considers the former's advice and recommendations. In addition to classification (reslotting), performance evaluation and salary administration, the Committee of Senior Officials also has come to focus on the policy of the career planning for deputies and executive resourcing in the public service. An annual review is now also conducted to identify potential Governor in Council appointees from among the lower executive ranks in the public service.

The establishment of the Advisory Group, of the Cabinet Committee on the Public Service and of the Committee of Senior Officials on Executive Personnel accelerated a consciously evolutionary process whereby the government has sought to give greater emphasis to the role of senior personnel policy and appointments in improving government management and decision-making. To facilitate this process there has been a continuous development of methodology and supporting arrangements. From these, two organization changes stand out especially.

First, by 1969 it had become apparent that there was a need for full-time staff to assist the Secretary to the Cabinet to fulfill his responsibilities for senior personnel. As a consequence, a Senior Personnel Secretariat was established in the Privy Council Office. This unit was made responsible for assisting the Secretary to the Cabinet and advising the Prime Minister on GC appointments and compensation. The unit also became the focal point for development of a performance assessment process. The Senior Personnel Secretariat has taken on a policy advisory role with respect to the management of the GC group, and indeed has had a growing role in the PCO's policy input into personnel management generally in the public service.

Second, in 1975 it was recognized that the burden of these matters on the Secretary to the Cabinet had become such that advantage should be taken of the establishment of the position of Secretary to the Cabinet for Federal-Provincial Relations to share

the task. Hence, the latter was given responsibility for the ultimate formulation of advice with regard to senior personnel appointments. This is done in consultation with the Secretary to the Cabinet and the Principal Secretary to the Prime Minister. Responsibility with respect to advice on government organization and process was left as the ultimate responsibility of the Secretary to the Cabinet. Here too, however, the two Secretaries to the Cabinet work closely together. This co-operation has been greatly reinforced by placing the Senior Personnel Secretariat and the Government Organization Secretariat in the PCO under a single Senior Assistant Secretary to the Cabinet who reports on matters of Machinery of Government to both Secretaries to the Cabinet.

Several other innovations are also occurring. The staff is playing an active role in the continuing identification of people within (and without) the public service with high promotion potential. The staff is also developing a more systematic process of career development for GC personnel. This is being done in part through the establishment of a computer-based information system. It should be noted that the Senior Assistant Secretary (Machinery of Government) also acts as the Secretary to the Advisory Group on Executive Compensation which independently advises the Prime Minister on rates of pay and conditions of employment of executive personnel in the Public Service.

2. Performance Assessment and Accountability

Performance assessment is the basic means by which senior public servants may be held accountable. In the system of parliamentary government in Canada, Ministers have individual and collective responsibilities which in large part may be delegated and hence are shared with their deputy heads. It is the Minister, however, who is held accountable by Parliament and the people, and who is answerable to Parliament for all aspects of the operations of his department.

The deputy minister is directly accountable to his Minister to whom he owes his first loyalty. By virtue of his appointment by the Prime Minister he is also accountable for his ability to support the management of the public service as a whole. Thus his performance must be assessed for the discharge of both his individual

responsibility to his Minister, and his collective responsibility in the system as a whole.

An initial assessment of a deputy will usually take place at the time of his appointment. Selection is based, in the main, on the job profile of the positions to be filled. This profile can be drawn from several sources: the powers and duties described in the Act governing the department to which the appointment is to be made and, in some cases, ascribed to particular positions; current government policy with respect to the area of responsibility in question; and the Prime Minister's views on the direction or redirection required in given areas of responsibility. From this emerges a general picture of the kind of candidate required; this is followed by an assessment of potential candidates for the job including their strengths, weaknesses, and experience.

Once in the position, the assessment of a deputy minister will be conducted in the first instance by the full membership of the Committee of Senior Officials on Executive Personnel (COSO)⁸. The members of the Committee base their review of the performance of GC appointees on information obtained from a number of sources. In the case of deputy ministers, Ministers are interviewed by the Secretary to the Cabinet or the Secretary to the Cabinet for Federal-Provincial Relations accompanied by the Senior Assistant Secretary (Machinery of Government) or the Director of Senior Personnel in the Privy Council Office. A five-point performance rating guide is generally used to provide the context of these discussions.

The second main source of information is obtained from the members of the Committee of Senior Officials themselves. The Secretary of the Treasury Board provides information on an individual deputy's administrative performance on program expenditures, financial and administrative management, personnel and official languages policies and guidelines, etc. The Chairman of the Public Service Commission reports on a deputy's exercise of his delegated staffing authority in his department and his adherence to the regulations promulgated by the Commission. Both the Secretary and the Chairman are able to draw upon the knowledge possessed by the senior officers who are in regular contact with

⁸ The present membership of the Committee includes eight members. The four permanent members are the Secretary to the Cabinet, the Secretary to the Cabinet for Federal-Provincial Relations, the Secretary of the Treasury Board and the Chairman of the Public Service Commission. In addition, to maintain the balance between the central agencies and departments, there are four other positions filled on a rotating basis from among other deputy heads for a two year term.

deputies and their departments. In addition, other members of the COSO, particularly the Secretaries to the Cabinet, provide comments on the contributions a particular deputy has made to the several senior inter-departmental committees in the overall policy development and coordination in the public service.

The total package of information received is reviewed by the Committee members through a series of meetings held normally during March through May of any year. During the course of the deliberations, tentative judgments are reached with respect to level of performance. The main criteria used in assessing an individual's level of performance include the value of the policy advice provided; the management skills and abilities demonstrated; and, the overall sensitivity to political concerns. Overall, performance assessments are broadly based and attempt to reconcile and balance differing viewpoints. They are consistent across the GC population in that a normal distribution curve is applied in establishing ratings.

On the basis of the performance assessments, the Committee of Senior Officials will recommend appropriate salary adjustments for consideration by the Cabinet Committee on the Public Service. Very often Ministers may see fit to modify the proposals. Once Cabinet has considered and approved the recommendations of the Cabinet committee, deputy ministers are informed individually in writing of the results of the performance review and salary setting exercise, as they pertain to their respective cases.⁹

The assessment process permits the meshing of both subjective and objective criteria of assessment. The deputy minister is in the first instance responsible to his Minister. His ability to provide his Minister with effective policy advice is mainly a matter of subjective assessment by that Minister. If a Minister is not satisfied with the work of his deputy he may ask the Prime Minister to have him changed. The specific criteria which a Minister may apply in assessing his deputy can cover the entire range of departmental functions.

If policy considerations are a main priority, then the deputy's policy skills are paramount, and even a capable administrator may

⁹ In cases where performance has been rated "fully satisfactory or above", a letter is now sent from the Prime Minister to the deputy concerned apprising him of his performance rating and salary award. In other cases, a letter is sent from the Secretary to the Cabinet responsible for personnel matters. It should be noted that in no case are individual salary decisions public information.

not prove satisfactory to a Minister who feels his deputy is not providing the policy support he requires. In the final analysis, the Prime Minister will consider Ministers' assessments and take them into account in the appointment and rotation of deputy heads. It is the Prime Minister who will assess how well the deputy's performance has supported the collective responsibilities of the Ministry as a whole.

More objective criteria can be established and are applied in the areas of administrative responsibility which accrue to a deputy head. While the deputy is the individual personally responsible for the day to day operations of his department, the basic routine tasks of departmental administration are subject to standards and policies which are established by central agencies to ensure that consistent practices are adopted throughout the government as a whole. These standards are used to provide reasonably objective measures against which a deputy minister's performance can be assessed.

The central management of the public service as a whole must be supportive of departmental needs. It follows, therefore, that in the areas of administration and management, deputies should be involved in developing the standards by which they will ultimately be judged. Specifically, these areas include financial, personnel and material management. The involvement of deputies in setting procedures would ensure that the resulting practice is viable and is based on operational needs. In this way, a balance may be struck between the individual responsibility of the deputy to manage his department and his collective responsibility for effective and efficient management of the public service as a whole. The use of management standards and guidelines as control measures should decline. As past experience has shown¹⁰, controls have never been a suitable substitute for accountability.

In sum, the assessment process must be uniquely structured to take into account the several facets of performance. Assessment begins when an individual is selected for a position and it will become increasingly important to develop methods of ensuring that deputies are aware of what is expected of them. Performance evaluation especially at the higher levels of management must be based on measurement of achievement towards meeting set objectives. While these cannot be finite, efforts are being made to

¹⁰ Royal Commission on Government Organization *Report*, Vol. I, p. 48.

broadly define them. Subsequent performance becomes a function of the individual's potential to develop and his ability to build upon his knowledge and extend his skills. It can be expected that the evolving relationship between Ministers and their deputies will lead, over time, to the development of increasingly sophisticated and objective assessment criteria respecting, for example, the deputy's policy responsibilities as departmental policy objectives are developed and refined and provide standards for deputies to work towards. The Minister's assessment of his deputy will continue to be a key aspect of the performance evaluation and the accountability of deputy heads.

In the broader context, the implications of the collective responsibilities of Ministers with respect to their deputies will also continue to shape and influence the assessment process. The deputy's performance, particularly as it pertains to administrative and management functions, must be evaluated within the context of the principles of management of the public service generally. The criteria developed to assess administrative and management performance will assist in the further development of standards which reflect the needs of departmental management as well as central management and which should provide a clear delineation of the responsibilities and performance of the Deputy in each area.¹¹

This paper has endeavoured to show the extent of the changes that have taken place since World War II. The demands placed on Deputy Ministers are much greater now, their responsibilities are greater, and it is only natural that enhanced accountability is required as a consequence. The means are not obvious, as a simple transfer from the private sector would be inappropriate and other government jurisdictions have not been able to progress more rapidly than in Canada. This is a central reason why the Government decided to create the Royal Commission.

The paper has further attempted to indicate that the system is in a state of flux. While the basic parameters may not be changing, the internal dynamics are. Progress has been made in the area

¹¹ R. A. Chapman has commented on the British System "... one of the primary qualities required in a higher civil servant is an appreciation of the constraints within which the work of central government administration must be carried on. It is not merely a recognition of the existence of the constraints ... but an awareness of how the constraints affect the system in practice and how they can be manipulated to achieve the desired ends of the central government itself." *The Higher Civil Service in Britain*, Constable, London, 1970, p. 133.

of selecting, managing and assessing the performance of senior public servants, but a great deal more needs to be done.

A clear statement of objectives is a key touchstone. Objectives are important for an appointee so that he knows what is expected of him, and for the Government so that it knows what kind of person it wants and what it can expect from him. The setting of clear objectives in the public service as in the private sector is at the heart of good management.

That much being clear, it is also clear from experience that objectives are more difficult to state with any precision in the public sector than in the private sector. Management is a key function of deputy ministers, and it is extremely difficult to set meaningful objectives for measuring performance in this function. Policy assessment is another key responsibility, and here it is very difficult to set useful objectives for individuals due to the ever changing situation. Policy advice is a third key responsibility, one where it is virtually impossible to set objectives, precisely because the work is so very subjective. In government it is service to the public and not the profit motive that is the guiding factor.

The Government is gradually moving to a system where it can enunciate and measure performance in the administrative area. The objectives here, however, must not only be shared with the employee but fit within the larger context of government as a whole, while being consistent with the individual statutory responsibility of Ministers. To this extent the objectives become political.

In the area of policy assessment it is possible to arrive at a better description of objectives, at least as to the functions which ought to be performed if not for the results to be achieved. Policy advice is so personal—for the adviser and the advised—that it is uncertain if meaningful—in the sense of assisting a differentiated system of performance assessment—objectives can ever be developed.

In this entire area new ground is being broken; the system must evolve, and the present effectiveness of the senior personnel system must not be jeopardized by innovations that have not been thought through. The steps taken must be progressive, for there is no panacea, leading to the greater use of meaningful objectives as the basis for performance assessment, the rock-bed of accountability.

SUBMISSION 4

THE FUNCTIONING OF THE
PRIVY COUNCIL OFFICE

December 1978

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I INTRODUCTION

In a 1971 paper of the Privy Council Office, R.G. Robertson, then Secretary to the Cabinet, described PCO's role as

one of information, co-ordination, follow-up and support provided to the Prime Minister and the Cabinet as a whole with, as a vital aspect, constant relations with all departments of the government.¹

The description remains valid today, and indeed the basic organization of the Privy Council Office has been maintained through the intervening eight years. But PCO has evolved and changed in important ways during this period in order to perform its essential functions.

This paper attempts to described how PCO is organized and how it does its business. Hopefully, the discussion will help to dispel the mystery that exists for many about the Privy Council Office, and help to promote greater understanding of the dynamic system of Cabinet government which PCO exists to serve.

1

R.G. Robertson, "The Changing Role of the Privy Council Office", a paper presented to the 23rd Annual Meeting of the Institute of Public Administration of Canada on September 8, 1971, and published in Canadian Public Administration, XIV, 4, pp. 487-508.

II MINISTERIAL RESPONSIBILITY, CABINET GOVERNMENT, AND THE PRIVY COUNCIL OFFICE

Ministers

The functioning of any one element of our governmental system makes real sense only in relation to responsible Cabinet government.¹

The starting point is the position of individual ministers. Ministers are legally responsible for the policies, programs and administration of their departments. In constitutional and political terms they answer to Parliament for the exercise of their authority. In governmental terms it is from ministers and their departments that policy and program initiatives flow. In human and practical terms, one of the very scarcest basic governmental resources is ministerial time.

Ministers do not, however, perform their functions in isolation from one another. Cabinet government involves the conventions both of individual ministerial responsibility and collective responsibility. Ministers together are responsible to Parliament not only for the policies of the government but also for the policies and programs of each minister as a member of the government.

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See "Responsibility in the Constitution Part I: Departmental Structures", Submission 1.

Ministers consult each other not only because they value the counsel of their colleagues, but because they must have one another's political support. The political reality is that individual ministerial actions affect the ministry as a whole. Responsibilities inevitably overlap. Today, more than ever before, the complexity of issues means that policies and programs must be developed in relation to each other to be successful. The consequences and side effects of policies require collective review of proposals. A decision on a northern pipeline, for example, is also a decision on native affairs, foreign policy, energy, economic development, employment, and the environment, and it can affect federal-provincial relations. Ministers can fulfill their individual responsibilities only by acting together.

Moreover, ministers must share the scarce financial resources of the Consolidated Revenue Fund and the scarce legislative resource of parliamentary time. These resources must be allocated among the proposals of various ministers by collective agreement, and their use must be coordinated for the collective benefit.

There is another practical basis for the interdependence of ministers in the Canadian federal government in particular: Canadian ministers are responsible not only for their departments but also for representing the differing perspectives and interests of the regions from which they come, perspectives and interests which cut across governmental activities and departmental lines.

Ministers must always be seeking a consensus on their goals, policies and programs. One function of PCO is to support this process of consensus-seeking.

Cabinet

In our system ministers carry the responsibility, power and authority. Cabinet is fundamentally a political mechanism to bring about agreement on general policy and on individual policies which affect the whole ministry.¹ In Cabinet, ministers individually may be very frank with their colleagues and tenacious about their views but constitutional and political usages require them to present a united front to the House of Commons, which holds them collectively responsible for government policies.

Cabinet issues are usually matters of policy, but other issues, including matters of administration, may come before Cabinet because of their general importance, because they affect responsibilities of a number of ministers, or because they have political significance. Issues are brought by ministers to Cabinet so that their colleagues may be informed, so that these colleagues may influence or participate in the final decision, and so that policies and programs may be co-ordinated and limited resources allocated.

While the time of ministers individually is a scarce resource, even less time is available for deliberations of Cabinet, when Ministers are assembled as a group. And the burden on Cabinet is very great, in terms of the number of issues brought before it, their complexity and

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Although the usual Canadian practice has been to include all ministers in the Cabinet, this is not constitutionally necessary. It is not the case in the United Kingdom or Australia, and there were exceptions in Canada in the past.

their importance. This calls for effective organization of Cabinet's time -- another responsibility assigned to PCO.

Cabinet Committees

Cabinet itself would be completely swamped in attempting to deal with all issues requiring consideration by ministers. A system of Cabinet committees has therefore been developed, functioning on a basis of secretarial support provided by the Privy Council Office.

The committee system is an extension of Cabinet. Committees are a means of achieving consensus in the face of the complexities of modern government. They permit ministers to inform their colleagues, and promote their participation in shaping and improving final decisions. Committees also improve coordination, so that policies and programs are more coherently related to each other. The operation of the Canadian system, where senior officials attend Cabinet committees with their ministers and may participate in discussions, permits ministers to be more aware of public servants' contributions to proposals and to ensure that political and ministerial perspectives are reflected in the outcomes.

The Prime Minister

Neither Cabinet government as a whole nor the Privy Council Office in particular can function or be understood without reference to the position of the Prime Minister.

Cabinet government is not a pyramid where the more central the office or agency the more superior its authority. It is a system in which ministers both head their own departments and collectively constitute the political executive - under the Prime Minister's leadership.

The Prime Minister's position is a particularly complex one. It has evolved through the conventions rather than through the law of the constitution. The Prime Minister is mentioned in very few statutes, and he does not have specific statutory powers, duties and functions in the way that departmental ministers do. His powers are real, but they depend on his standing in the government and the country and the need of ministers and the constitutional system for a focal point to exercise certain necessary functions.

In very broad terms, the Prime Minister has a special responsibility for the success of the government as a whole, and for creating the circumstances in which consensus may be reached, maintained, and employed successfully in political and governmental terms.

In his several roles the Prime Minister is supported by separate staffs.

As a Member of Parliament, he has assistants in his private office concerned with his constituency affairs.

As leader of his political party, he is served by the Prime Minister's Office. In the Robertson article and a companion paper by Marc Lalonde, then Principal Secretary to

the Prime Minister, PMO is described as partisan, politically oriented yet operationally sensitive. In contrast, PCO is described as non-partisan, operationally oriented yet politically sensitive.¹ PMO is personal in orientation, and is attuned to the relatively short-term focus of how the Prime Minister and the government are seen and accepted by the public. The personal staff who manage the Prime Minister's schedule are PMO officers. In keeping with its role as the Prime Minister's partisan staff, PMO is a distinct organization headed by the Principal Secretary to the Prime Minister. Its officers are not public service appointees but rather politically determined appointments in the category of "exempt staff" as provided by the Public Service Employment Act.

The Prime Minister is also head of the government. Internationally he meets with other heads of government from many different governmental systems. As Prime Minister of the Government of Canada he chairs Canadian first ministers' conferences; in this capacity, but also much more broadly and substantively in the area of federal-provincial relations, the Prime Minister is supported by the Federal-Provincial Relations Office.

¹ Marc Lalonde, "The Changing Role of the Prime Minister's Office", a paper presented to the 23rd Annual Meeting of the Institute of Public Administration of Canada on September 8, 1971, and published in Canadian Public Administration, XIV, 4, pp. 509-537.

The Prime Minister is head of government in a Cabinet system, where his leadership of the government and his chairmanship of Cabinet are inseparable; each reinforces the other and neither predominates. It is in this capacity that he is supported by the Privy Council Office.

As head of Cabinet government the Prime Minister does have distinct powers. A Canadian minute of council first issued in 1896 and last re-issued in 1935, enumerates some of his prerogatives, including calling meetings of the Cabinet, recommending the dissolution and convocation of Parliament, and recommending various appointments (notably those of Privy Councillors, ministers, lieutenant governors, chief justices of all courts, senators, deputy ministers, and membership of the Treasury Board and of Cabinet committees). This minute recognizes the Prime Minister's prerogatives but does not confer them. His position rests on his exercise of functions which arise from the needs of the system.

First, it is the Prime Minister who most influences the setting of general directions of government policy. Other persons and institutions have their roles too - the party, its parliamentary caucus, and of course ministers. They make up the environment in which this function is exercised, but the Prime Minister is the focus of the process.

Second, the Prime Minister chooses the principal office-holders, both ministerial and civil service, who will work to accomplish those directions.

Third, the Prime Minister establishes the scope of the mandates and jurisdictions of the office-holders and adjusts the balances and relationships among them. He is responsible for arranging and managing the decision-making process as a whole.

Finally, the Prime Minister is obliged to take a special interest in certain areas of government policy such as national security, Canadian intergovernmental relations, and external affairs. A Prime Minister may choose to concern himself in differing degrees with these areas, each of which has its own minister, but the Prime Minister has a particular responsibility because the nature of the subject matter is so vital to the national interest.

The PCO Perspective

In this context of ministers, Cabinet, Cabinet committees and Prime Minister, the various departments of government serve their individual ministers and contribute their own perspectives. The Privy Council Office, as the Prime Minister's department and as the staff of the Cabinet, also contributes a particular perspective.

PCO's perspective is first of all a concern for the broad process of policy-making. This involves the effectiveness of Cabinet's organization and procedures, and the whole process of decision-making in government. These things matter to Cabinet, but they are also a particular responsibility of the Prime Minister.

The concern for process also involves the relationship between elected politicians and permanent public servants. The PCO operates at the meeting point between ministers collectively and the public service. PCO receives ministerial and departmental proposals moving to Cabinet and transmits Cabinet decisions afterwards. It is the support organization for Cabinet committees at which both ministers and officials are present.

In the long term, the PCO concern for process extends to continuity when Governments change - continuity in the ability of the Cabinet machinery to support a new government as it installs itself in power and injects its own directions into the governmental apparatus. As with the rest of the public service, PCO's role is to support the ministry responsible to the Parliament of Canada.

PCO's special view of policy looks to coordination of emerging policy changes and to relationships with other policies and with the government's objectives as a whole. PCO tries to ensure that all the affected interests have been consulted and that a full range of alternatives has been considered prior to decisions.

III PRIVY COUNCIL OFFICE STRUCTURE

The structure of the Privy Council Office reflects its support of Cabinet, Cabinet committees and the Prime Minister.

Under the Secretary to the Cabinet there are Plans and Operations divisions each headed by a Deputy Secretary. Each division is organized into several secretariats headed by Assistant Secretaries and consisting normally of half a dozen or fewer officers. The Operations division consists of secretariats supporting five Cabinet committees organized by their subject matter - Government Operations, Economic Policy, External Policy and Defence, Culture and Native Affairs, and Social Policy. The Division also has sections dealing with the coordination and scheduling of Cabinet business, and with the distribution system for Cabinet Documents. The Plans division consists of secretariats for Priorities and Planning, Legislation and House Planning (linked to the Orders in Council section), Machinery of Government (which includes separate directorates of Government Organization and Senior Personnel), Public Information, and Planning Projects. A separate secretariat deals with Security, Intelligence and Emergency Planning, and directorates of Administration and Personnel provide administrative support for PMO, the Office of the President of the Privy Council Office, and the Federal-Provincial Relations Office. FPRO is headed by its own Secretary to the Cabinet for Federal-Provincial Relations, who reports directly to the Prime Minister and, in a different sense, to the Minister of State for Federal-Provincial Relations.

To a degree, it is helpful to think of the Operations division in terms of support to Cabinet and the Plans division in terms of support to the Prime Minister. The Operations secretariats serve standing Cabinet committees and their chairmen. The Plans secretariats serve Cabinet committees chaired by the Prime Minister or by the President of the Privy Council¹, or provide advice on matters of particular concern to the Prime Minister, such as machinery of government. But no simple organizational distinction is accurate. PCO is the Prime Minister's departmental staff in his capacity as head of government, and his functions focus and unite PCO's activities in support of Cabinet.

Cabinet, Cabinet committees and PCO Structure

a) Continuing Conventions

Whatever the changes in its own organization and procedures, or in the operations of Cabinet and Cabinet committees, the Privy Council Office has an obligation to reinforce the capacity of ministers to make decisions.

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The President of the Privy Council is not the minister responsible for the Privy Council Office; that is the Prime Minister. The Presidency of the Privy Council is a portfolio which used to be held by the Prime Minister but is now occupied by the Government's House Leader. The present President of the Privy Council, the Honourable A.J. MacEachen, is also Deputy Prime Minister.

The phrase "Ministers will decide" is no empty formula; it recognizes that ministers have the formal authority and responsibility to act in their own policy and program areas, and that ministers will decide on larger or different criteria than those available to officials. Other departments share the same obligation, but PCO in particular can reinforce it through its distinctive role in the management of the policy-making process - as distinct from its substance. PCO emphasizes a number of conventions or rules designed to maintain the distinction between ministers and officials.

For instance, despite the burden on Cabinet, PCO has resisted the idea occasionally advanced that some bureaucratic screening mechanism should be placed between ministers' proposals and Cabinet consideration. PCO officials can not and should not be able to reject or alter ministers' memoranda to Cabinet. Such a practice would almost certainly put undue power into officials' hands, whatever its intention.

Similarly, with rare exceptions, only ministers sign memoranda to Cabinet. Another rule requires that Cabinet memoranda set out alternative proposals for consideration. These rules help maintain the ministerial character and control of the issues discussed at committees and Cabinet. For the same reason, only PCO officials attend Cabinet and do not sit at the Cabinet table or speak except on rare occasions to answer questions. Officials from other departments may be called to Cabinet but this is almost never done. Efforts are made to minimize the number of officials who attend Cabinet committees with their ministers. Officials, including PCO officials, sit at the table only to address a specific item or answer questions.

In these and other ways the Privy Council Office tries to reinforce the position of ministers individually as well as in Cabinet and Cabinet committees. In playing its role, PCO can help ministers remain in control of the government, including the public service. Yet PCO cannot formulate and impose these conventions itself. Its role in this respect, as in others, is in support of ministers at the direction of the Prime Minister.

b) Developments in the Cabinet Committee System

It has proved useful to have a structure of standing committees organized according to policy areas, as well as coordinating committees with particular perspectives. The subject-matter committees each embrace one general area of government activity and assist its management by bringing together the ministers concerned. These committees cover the whole spectrum of government policy-making so that all proposals to Cabinet pass through a committee system designed to ensure that they can be considered by the ministers directly concerned. The coordinating committees cut across these policy areas according to their special roles. Each coordinating committee is involved with and contributes to the development or consideration of policy proposals from its own perspective.

The committee process is a flexible and continuing one, however, not a matter of mechanistic application. A policy proposal would normally be the subject of interdepartmental or informal interministerial consultation. It could first come to Cabinet as a broad idea, which might be considered at the outset in the Cabinet Committee on Priorities and Planning.

After further consultation and elaboration it could be considered by a subject-matter committee and if it had expenditure implications, by Treasury Board. It would then proceed to a policy decision by full Cabinet. If the policy required legislation, a draft bill would be prepared for the Cabinet Committee on Legislation and House Planning. With subsequent Cabinet approval of the bill, the policy would be presented in legislative form for debate by Parliament.

The standing subject-matter committees at present are Culture and Native Affairs, Economic Policy, External Policy and Defence, Government Operations, and Social Policy. The coordinating committees are Priorities and Planning, Legislation and House Planning, Federal-Provincial Relations, and the Treasury Board. The Special Committee of Council also meets regularly and frequently to consider the more routine orders in council. Special committees exist but tend to meet less regularly, including Cabinet committees on Security and Intelligence, Labour Relations, and the Public Service. Finally, there has been a variety of ad hoc committees on matters as diverse as Multilateral Trade Negotiations, Maritime Boundaries, and Northern Gas Pipelines.

Changes in committee structure over the last few years have promoted greater flexibility. Committees meet according to less rigid schedules. Ad hoc committees have been used more often as a means to focus on special policy areas and problems. A change intended to reduce the pressures on ministerial time has been the "twinning" of Culture and Native Affairs with Social Policy, and of Federal-Provincial Relations with Priorities and Planning. In each case the memberships are the same so that both can

meet at the same time to deal with the agendas of both committees.

A recent and somewhat experimental development has been the establishment of a more public basis than most Cabinet committees of the new Board of Economic Development Ministers. The Board is chaired by a Minister of State. It is supported by a policy-oriented departmental secretariat and PCO is its link to the rest of the Cabinet system.

The Treasury Board has always been a special case, with its own statutory responsibilities complementing its position as a Cabinet committee. Its ability to control the government's expenditure budget has been increased by routing each proposal with expenditure implications to the Treasury Board for its views after the proposal has been considered by the appropriate subject-matter committee but before the committee's report is put on Cabinet' agenda.

c) PCO Support of Cabinet and Cabinet Committees

Cabinet requires secretarial and administrative support both in preparing for its meetings and in conducting them. Ministers can participate effectively in Cabinet only when they know what is to be discussed, when it is to be discussed, and what is at issue. The Privy Council Office performs this necessary basic service. PCO officers prepare the Cabinet agenda, distributing documents, arrange meetings, and record and circulate Cabinet minutes and decisions.

This service role extends to Cabinet committees, as reflected by the PCO structure. Each Operations secretariat serves a standing subject-matter committee and any ad hoc committees which deal with related subjects. Together, the Operations secretariats maintain an overview of the whole range of government activities, while each maintains an overview of its own sector.

The secretariat's job is to try to ensure that all relevant considerations are available to the committee. This is done not through participation by PCO officials in committee discussion but through advice to the chairman of each committee. It is for him to assess the information provided by the committee secretariat. The secretariats review ministerial proposals and prepare briefing notes for the chairman. They discuss a possible sequence for discussion, key points of note for participating ministers, background disagreements and alternative proposals, and the relationship of proposals to other policies or objectives of the government.

As proposals move from committee to Cabinet, the same secretariats provide briefing notes for the Prime Minister. These notes review the committee discussion as necessary and focus on Cabinet's task of producing a decision. If there is no resolution required after committee discussion, i.e. if ministers were agreed in committee, the committee's report is placed on the annex to the Cabinet agenda and is automatically approved unless a minister queries it.

Plans secretariats support the Cabinet committees with special responsibility for coordinating overall governmental directions. The secretariats for Priorities

and Planning and for Legislation and House Planning support two of the four coordinating committees of Cabinet (and the Orders in Council section supports the Special Committee of Council). The other two, Federal-Provincial Relations and the Treasury Board, are served by separate secretariats with which the PCO works closely.

The Cabinet Committee on Priorities and Planning includes the chairmen of all subject-matter committees and is therefore in position to deal with the whole range of government business. It operates not only as a forum for discussion of the government's main priorities and directions, but as an "executive management" committee to which particularly difficult, important or contentious policy matters are referred. On a continuing basis the Committee examines the fundamental issues involved in the financial, budgetary and legislative cycles of government activity.

d) A Critical View

The operation of the more structured committee system, and the decision-making process it involves, has not been without costs or problems. There is more coordination in planning and decision-making, and more effective emphasis on consensus. Ministers are probably more consistently aware of the totality of government policy than they were able to be some years ago. As anticipated by R.G. Robertson, these improvements have required more of the time of ministers for issues beyond their immediate concerns, but the combination of the structured committee system and the more recent emphasis upon flexibility probably places fewer direct demands upon ministerial time now than earlier arrangements. However, there has been a tendency for this

structured system to attract issues of a detailed nature. Some issues are brought to Cabinet so that their resolution will carry the administrative cachet of a "cabinet decision". There has been a related tendency for other means of interministerial and interdepartmental consultation to decline somewhat, although the trend toward flexibility in the operations of the committee system is countering this. There may have been a reduction in the capacity of ministers to take decisions and quick action on their own. There have been occasions when policy decisions have been "averaged", rather than reaching towards more adventurous directions -- which obviously have their hazards as well as benefits. Overall, the decision-making process, while hopefully more comprehensive and foresighted, may be somewhat slower. Part of this may be due to the fact that public issues have become more complicated and interdependent, and require more time to sort out.

A more fundamental problem has been that the policy implications of an initiative have tended to be examined in one committee, but the financial and human resources required by the initiative have been examined separately in other committees. The system may not have provided adequately for the integration of these considerations. Moreover, the system of Cabinet deliberations has worked "at the margin" - that is, with new proposals and new expenditure requirements rather than with the whole picture, including ongoing policies and programs.

On the other hand, the "fiscal framework" -- that is, the resources available to the government at any given time -- has become a familiar working concept for all departments and ministers. Proposals with expenditure implications are now routed formally through Treasury Board

on their way to Cabinet, and more recently, the creation of the Board of Economic Development Ministers has brought policy and resource considerations into one forum.

This is the critical view of the developments over the past decade, and it must be balanced by a recognition of the accomplishments and of the difficulties which would have developed in the absence of changes. It is precisely to meet problems such as these that the Cabinet committee system has been developing - and not unsuccessfully. It responds to and must satisfy the policy and political perceptions of ministers as they change and develop. No structure is permanently valid; every structure must remain open to change.

The Prime Minister and PCO Structure

a) Background

Whatever activities PCO may be pursuing, in assisting ministers, supporting Cabinet and servicing Cabinet committees, the pervasive reality is that they are pursued as part of PCO's support of the Prime Minister as head of government. That position underlies PCO's capacity to achieve, but it also is a limiting factor. PCO officers should always be conscious of the primary and unique position of ministers in the Cabinet system. Moreover, the role of PCO officers does not extend to the Prime Minister's concern in his capacities other than head of government - as party leader, for example, where he is served by the Prime Minister's Office.

The role of head of government by itself requires substantial support. From 1912 until 1946, the Prime Minister was his own Secretary of State for External Affairs. His departmental officials could assist him in his broader functions as required. But the increasing scope and complexity of government made the extra burden of a separate department impossible for a Prime Minister. The same expansion of government made the Prime Minister's own functions and responsibilities more burdensome. For example his special responsibilities for senior appointments and the machinery of government, which are so important in the scheme of Cabinet government, could no longer be as effectively exercised without increased support. Similarly, a Cabinet and Prime Minister supported by a relatively tiny staff could no longer fully counteract the normal pressures which tend to isolate departments from one another, and sometimes put them at loggerheads. Consequently, Prime Minister Pearson decided that he needed a more broadly based and systematically organized public service staff within the Privy Council Office, rather than a group of assistants, to serve him as head of a Cabinet government.

b) The Chairmanship of Cabinet

As chairman of Cabinet the Prime Minister is responsible for the processs of Cabinet operations, for leading Cabinet's deliberations.

The whole PCO supports the Prime Minister in his role as chairman of Cabinet - in secretariat activities, in preparing briefing notes for the Prime Minister, and pervasively in support of the Cabinet committee system to the Prime Minister's preferences and standards.

c) The General Directions of the Government

The major forum for consideration of the general directions of the government is the Cabinet Committee on Priorities and Planning, although the final decisions are Cabinet's. The Prime Minister chairs this committee, which reflects his central role in setting, coordinating, explaining and following through on the government's broad directions. The Priorities and Planning secretariat supports the Prime Minister in these responsibilities, both as head of government and as chairman of the Committee.

It is necessary to rise above the day-to-day flow of policy analysis and decisions in order to affect the longer term, but defining and stating the government's priorities cannot be an abstract "top-down" or "governing by goals" exercise. The longer view must be linked to specific activities and events to give a real shape to priorities. There are certain key opportunities for this review of priorities and identification of longer-term work. In particular, the attention given to important personnel matters, to major policy reviews and to the key budgetary, expenditure and legislative cycles of government work is a lasting product of the more structured approach developed in the last decade. The cycles have always been important, but they have been seized for planning and priority setting more than ever before. The processes of deciding upon the budget and the elements of the Speech from the Throne have become much more collective in nature. The continuous elaboration of the fiscal framework, within which all policy development and adjustment proceeds, has been particularly novel and important. There are also occasions when the government decides that a longer-term view should be articulated outside of the normal cycles. The Priorities and Planning

Committee can set this work in motion, particular recent examples being the policy statements entitled The Way Ahead, Agenda for Co-operation and Time for Action.

The other Plans division secretariats are also involved in developing and expressing the government's general directions, although not to the same extent. The Legislation and House Planning secretariat, for instance, supports the Cabinet committee responsible for ensuring that the government's directions and decisions are implemented through ministers' legislative proposals, and amalgamated in the legislative program.

The Operations secretariats also contribute to the development of the government's broad policy. Their secretariat, service, and coordinating functions are the basis upon which PCO builds its policy overview. The Plans division could not function without the knowledge, support and the sometimes critical viewpoints of Operations.

Together the Plans and Operations secretariats try to ensure that the Prime Minister is comprehensively in touch with developments across the government.

There are disadvantages to these relatively structured arrangements. The process may not provide sufficient opportunity for the necessary frank injection of "pure politics". It may be that some of the political energy is lost in favour of other considerations. This problem has been countered by holding meetings without officials such as the weekly sessions of a political planning committee, and occasional gatherings of ministers at Meach Lake near Ottawa.

d) Appointments

The prerogative of selecting ministers and initiating the selection of key individuals for certain senior positions in the public service, Crown Corporations, regulatory commissions, and other non-departmental bodies has always been considered the Prime Minister's alone. However, major appointments are made only with the agreement of the minister involved.

Evidently the most important appointments are those of ministers; a Prime Minister keeps these choices much to himself, although he may well consult his colleagues and party officials, and his PMO or PCO officials on particular matters. But ministerial appointments are relatively few. It is also the Prime Minister's right to recommend to the Governor General more than 300 key appointments of deputy heads and heads of agencies across the government, following consultation and agreement with his colleagues as necessary. Some of these non-ministerial appointments, such as those of chief justices, are evidently of great importance. There are also, of course, many other appointments made on the recommendation of ministers.

The Prime Minister used to have relatively little assistance in making appointments, since most tended to be made on the basis of seniority. It was recognized increasingly, however, that senior appointments are as important as most policy decisions. In a sense, people are policy, and policy is nothing without people. The Prime Minister came to require more support in making selections and in developing a policy for senior appointments.

Consequently, within the PCO Plans division a Senior Personnel Secretariat was created to advise the Prime Minister on senior public service appointments and career planning, and on senior personnel policy, through its records and compilations of candidates. It also supports the special Cabinet Committee on the Public Service, which is chaired by the Prime Minister and deals with personnel management policy, and the complementary Committee of Senior Officials on Executive Personnel and the Advisory Committee on Executive Compensation in the Public Service. The importance of the subject also means that personnel development occupies much of the time of senior PCO officers. Both the Secretary to the Cabinet and the Secretary to the Cabinet for Federal-Provincial Relations advise the Prime Minister on senior personnel matters.

This structure should provide a broader basis for making appointments and for developing senior personnel policy. The danger in any such structure, of course, is that it might overshadow the intuitive, almost gambling appointments which are occasionally necessary.

e) Government Organization

At the heart of the Prime Minister's management of the process of decision-making is his unique responsibility for jurisdictions and organization. The Prime Minister's special concerns as head of government are, first, that cabinet government, including cabinet structure, works as it should; and second, that the government functions efficiently and effectively. Only the Prime Minister can balance the necessary relationships and match the leading officeholders, ministerial and official, with the current problems of government and its structure. Other issues of organization and their endless implications are dealt with

by the Treasury Board, and its secretariat, in meeting its responsibilities for general administrative, personnel management, and financial management policy and standards, and for the organization of the public service, as set out in the Financial Administration Act.

Effective government requires the continuous review and adjustment of mandates or jurisdictions. In meeting this responsibility, the Prime Minister is supported by the Government Organization directorate, which with the Senior Personnel directorate makes up the Machinery of Government secretariat in the Plans division. All sections in PCO are concerned with the effective operation of the decision-making process generally. But there is a need for special knowledge and experience in these matters.

f) Areas of Special Prime Ministerial Concern

Finally, there are areas of policy in which a Prime Minister must take a special concern. In these cases the Prime Minister requires public service support of his own.

In external affairs, for example, the Secretary of State for External Affairs is the responsible minister, fully answerable for his department's activities and advice, but a Prime Minister as head of government often must take a particular interest in external affairs. The External Policy and Defence Secretariat of the PCO, working in close consultation with officials of the departments from which the PCO officers come, is able to advise the Prime Minister.

The area of policy most clearly the Prime Minister's responsibility as head of government is federal-provincial relations. In 1975 the federal-provincial relations division of PCO was established as a separate office. It works closely with PCO but reports directly to the Prime Minister through its own Secretary to the Cabinet for Federal-Provincial Relations. In 1977 a Minister of State for Federal-Provincial Relations was appointed to assist the Prime Minister who is the minister responsible for FPRO. Ministers are directly involved in federal-provincial relations not only through their departmental portfolios but in their capacities as representatives of the regions of the country.

A third concern to the Prime Minister is national security. Security policy is confided to the Solicitor General, but in the final analysis the Prime Minister as head of government cannot escape a special responsibility for the security of the country. A separate PCO secretariat for Security, Intelligence and Emergency Preparedness operates in close cooperation with the Solicitor General's staff, advises the Prime Minister and supports the special Cabinet Committee on Security and Intelligence which he chairs, although it meets infrequently. The head of the secretariat reports directly to the Secretary to the Cabinet.

Another concern to the Prime Minister as head of government is the ethics of government. Naturally every minister is concerned with this question, but it is normally for the Prime Minister to take the initiative when policy in this area is developed. It is usually, but not exclusively, from within PCO that the Prime Minister is supported in

these cases. Instances are standards of ministerial conduct, conflict of interest guidelines, and secrecy and openness in government. PCO is also inevitably concerned with the degree of confidentiality in government since so much of its activity has to do with matters under confidential Cabinet consideration. For this very reason, no agency is more responsible for pushing for openness. PCO must continually ask itself what really needs to be confidential and what can be open, and exercise leadership where it can - such as in the implementation of a Cabinet documents system which now includes "discussion papers" intended to be made public after Cabinet consideration.¹

Finally, issues may become of particular interest to the Prime Minister and to PCO because they do not fall evidently to one department. Instances are nationally important labour relations crises and the consultative process with business and labour, both handled by the Planning Projects secretariat in the Plans Division.

¹ - cf. The PCO manual, The Cabinet Papers System (Ottawa, 1977).

IV RELATIONSHIPS WITH THE PRIVY COUNCIL OFFICE

The Privy Council Office is influential but it has no automatic power because of its position "at the centre" of government. While PCO communicates ministerial decisions and does have an overview of policy activities, PCO's influence depends very much on how others view it, accept it and use it.

Each apparent reason for PCO's position of influence reflects a limitation the system imposes as well.

Access to the Prime Minister is important. It can also mean less than it may appear. PCO has access but does not control access to the Prime Minister; his time is managed by his personal staff. The Prime Minister regularly sees ministers on an individual basis, and he hears them collectively in Cabinet and in Priorities and Planning every week. Members of Parliament express their views to him personally at caucus meetings, in the House of Commons, and on other occasions. He also receives other advice daily - from FPRO and in particular from PMO, whose viewpoint is to support the political concerns of ministers. PCO cannot monopolize the Prime Minister's time and attention because there are so many other imperative calls upon him and because PCO's official viewpoint is only partial.

PCO also has influence as a result of its overview of policy across the government. But departments have their own unique expertise, there are other central agencies, other officials attend Cabinet committees, and Cabinet documents are circulated to all deputy ministers and many

other senior officials as well as to their ministers. Indeed, one of PCO's purposes is to disseminate its knowledge in order to help the decision-making process. Moreover, PCO's overview depends fundamentally on contacts with departments, not on the formal system of Cabinet documents. PCO can maintain its unique access to information only when it does not misuse it from the departmental points of view. To become an adversary of departments would very quickly defeat PCO's own functions.

A third reason for PCO influence is its proximity to Cabinet. Here again, however, PCO's position as Cabinet secretariat would be jeopardized by manipulation of agendas or decisions, or by appearing to blur the distinction between ministers and officials. Therefore, the core of PCO activity must remain the maintenance of a system which produces timely decisions based on consensus, in which the affected ministers and departments have been fully involved. A great many people must live with the system's decisions.

The Prime Ministerial Offices

The Prime Minister should be protected from receiving advice from only one institutionalized source. Even as head of government, he is advised by the Federal-Provincial Relations Office as well as PCO. But the distinction between PCO and PMO is even more important. Their different perspectives permit the Prime Minister to protect himself from the dangers both of narrowly partisan advice and of unrealistically bureaucratic advice. For this process to work, PCO shares its information base with PMO, although the reverse is not the case. An extension of this

principle is the participation of PMO in certain inter-departmental meetings to ensure expression of the necessary political viewpoint which public servants should not feel compelled to anticipate or inject themselves.

This process has parallels elsewhere in the system. Independent, individually responsible ministers, each heading a substantial department of government, bring their departmental and political perspectives to bear in reaching the consensus decisions which collective responsibility imposes upon them. The process of consensus-seeking and comparison of departmental perspectives goes on at the official level too, and PCO is part of it. Indeed, a responsible PCO searches out departmental views for the attention of the Prime Minister and committee chairmen.

Relationships with Central Agencies

A great deal of the development of consensus proceeds more or less naturally among ministers and departments. A great deal more is fostered by organizations other than the Cabinet which nevertheless support ministers collectively -- that is, by central agencies.

Departments tend to be divided into line departments serving individual ministers and central agencies primarily supporting ministers collectively. Ministers of central agencies have special financial and policy coordinating functions. Each central agency plays its role from a particular perspective - Treasury Board in expenditure and managerial coordination; FPRO in federal-

provincial relations; the Prime Minister's Office in political coordination; Finance in economic policy; the Board of Economic Development Ministers in economic development; Justice in legal coordination, External Affairs in foreign policy.

The unique contribution of the Privy Council Office as a central agency is through the process of policy coordination -- in terms of relationships between new proposals, existing policies and the government's overall objectives. PCO's links with other central agencies are close; for example, the Treasury Board Secretariat, FPRO, PMO and the Secretariat to the Board of Economic Development Ministers are represented at the "round up" meetings in PCO held after each Cabinet meeting to report Cabinet's decisions (although not the ministerial discussions).

Two complementary rules of thumb guide PCO relations with other central agencies: first, avoid trying to take on their functions; second, protect line departments from domination by central agencies; and in both cases ensure that they are heard. Again this is part of PCO's responsibility under the Prime Minister for the maintenance of an effective Cabinet system.

Relationships with Line Departments

The rule for PCO relations with line departments is not to interfere with their will and capacity to do their job. R.G. Robertson called it "staying off the field". It is more than a static concept. Only if a line department is doing the necessary work and thinking itself and is given the scope it needs, will it take on the interesting jobs,

think comprehensively and accept the responsibility it should have. If this is not happening, a spiral sets in. The department cannot attract the best people, its performance declines, and there is more pressure to centralize the important thinking away from the department. The department in turn becomes less responsible and its work less interesting, which means it cannot attract good people. An important objective of PCO, and a particular concern of the Secretary to the Cabinet as senior deputy minister of the public service, is to guard against this spiral, and to make recommendations to the Prime Minister to reverse it if it happens.

Relationships with Parliament and Opposition

The Privy Council Office is a branch of government designated a department for purposes of the Financial Administration Act. The Prime Minister is its minister, and he is responsible for PCO to Parliament. PCO's relations with Parliament are similar to those of other departments of government, but they also reflect its unique constitutional aspects and Parliament's own practices.

While the Prime Minister answers for PCO in the House of Commons, he does not appear before parliamentary committees. Instead, the President of the Privy Council appears; his functions as well as his title are concerned with PCO, and PCO supports his office, but he is not responsible for PCO. While PCO administrative officials appear before parliamentary estimates committees, senior PCO officers and in particular the Secretary to the Cabinet have not in the past appeared with respect to the work of PCO or

of Cabinet generally, although they have occasionally appeared before other parliamentary committees to discuss special areas of policy. The traditional view, occasionally questioned, is that because PCO is not a program department, or because its only program is serving the Cabinet, appearances by senior PCO officials to defend PCO's "program" would inevitably result in defences of Cabinet itself - a task for ministers, not civil servants.

Through its Legislation and House Planning secretariat, PCO supports the President of the Privy Council in the processing of legislation, planning future government business for Parliament, and in analyzing parliamentary procedures. But the actual Office of the President of the Privy Council, with its politically determined staff, is separate from PCO, and is larger than the "exempt staff" offices of other ministers in view of his responsibilities. The PMO officers who have responsibility for legislative matters are also quite separate from PCO.

Finally, PCO is the organization which must be ready to serve the alternative Prime Minister and Cabinet. Consequently, in preparing during each election campaign for a potential change of government, PCO compiles a briefing book which would be submitted to a new Prime Minister, describing existing organization and procedures, assessing possible changes, and summarizing present and upcoming issues and choices. The Secretary to the Cabinet is the senior official of a public service which similarly must be prepared to serve an alternative government.

Relationships with the Media

Relationships with the media present other difficult questions. Most journalists know what PCO is and who is in it, so should PCO have a media relations office or should it take communications initiatives at least when there is no other clear lead department? The answer has been: probably not, even though PCO officers may well speak informally to journalists from time to time to provide background on issues which particularly involve PCO. To avoid confusion between PMO and PCO, and as a matter of best serving the Prime Minister, it is PMO, with its legitimate interest in presenting an announcement in the best way politically, which makes all announcements from the Prime Minister.

On the other hand, however, the modern reality of big complex government demands a central mechanism for coordinating the presentation of government policies to the public. The course adopted has been to establish within PCO, as part of the Plans division, a Public Information secretariat which supports the Cabinet Sub-Committee on Public Information. The secretariat assists departmental information services, but makes no announcements itself.

V OPERATIONS OF THE PRIVY COUNCIL OFFICE

The Dry Facts

In 1978-79, PCO Operations and Plans divisions included 145 person-years: 75 officers and 70 support staff. The PCO budget for 1978-79 was \$6,783,000. Figures for the "Privy Council" in the annual estimates of the government are considerably higher because they include far more than PCO, which is referred to as the "Cabinet Secretariat". Other organizations within the same Estimates section are the Federal-Provincial Relations Office, PMO, and the Offices of the President of the Privy Council and Leader in the Senate, all of which are served by a common administrative section. Other quite separate organizations are also placed under "Privy Council" because their appropriate ministers are the Prime Minister or President of the Privy Council. They include offices as diverse as that of the Chief Electoral Officer, the Public Service Staff Relations Board and the Economic Council of Canada.

Basic PCO Activities

PCO activities have been discussed in relation to the organization's role and structure. It may nevertheless be useful to outline four basic, day-to-day activities.

a) Secretariat Activities

Secretariat activities involve the circulation of Cabinet papers, and the scheduling, preparations for, and recording of meetings and decisions. The question "what did they decide?" is not always easily answered, but records of

decision summing up the ministerial conclusion and direction must be written, and must satisfy all the participants concerned.

b) Monitoring Activities

A second basic activity is monitoring. Each secretariat must maintain a watching on brief developments in its area. This involves ensuring that responsible ministers and departments are involved when they have a concern, that they participate in policy discussions affecting them, and that they are aware of the content and timing of major decisions.

c) Advice

A third activity is advising, in the form of preparing briefing notes to committee chairmen and to the Prime Minister.

Advice first of all distinguishes between policy and program. PCO is concerned with policy in general, or with program design when it amounts to policy. Other departments are concerned with policies in their own particular areas, and with the interrelationships between particular policies and particular programs and program designs. Other coordinating agencies are most concerned with policies from a particular focus -- for example, financial or economic development policy -- and with the design of programs and the application of resources to achieve policy objectives. PCO is concerned with the coordination of policy development and program consequences

which are so large and complex as to amount to policy. It facilitates policy-making but does not set policies. It attempts to see to the fulfillment of the process rather than to the achievement of a particular outcome.

PCO advice on the the responsibilities of particular ministers involves for the most part informing rather than initiating, and asking questions about proposals rather than developing them from scratch. The perspective is PCO's overview; the criteria are previous decisions, precedents, continuity, priorities and related activities. The intention is to ensure that the consequences of alternative decisions are clear, so that ministers choose with full knowledge available.

This activity also involves ensuring that viable policy alternatives to particular proposals are reflected in the advice reaching the Prime Minister, once again as a means of ensuring that he is never a captive of one source of advice. This is rarely a matter of developing program proposals, but rather of ensuring that alternatives developed in different departments have been canvassed. PCO advice can involve formulating or developing policies in areas of special concern to the Prime Minister, where there is no clear allocation of responsibility to a particular department or in a new area.

d) Brokerage

Because of its secretariat, monitoring and advisory activities, and its access to the Prime Minister and committee chairmen, PCO is often sought out by departments as a broker. PCO becomes involved in

"firefighting" on important issues, and in mediating jurisdictional disputes. It searches out or arranges compromises, or more often arranges for parties to get together so they themselves can agree.

The Instruments

PCO operates with the instruments common to all permanent civil services -- chiefly documents and meetings.

a) Documents

PCO obviously produces and moves paper and documents. Perhaps the most important is the minister's document, the Memorandum to Cabinet. Once a memorandum has been submitted, PCO is responsible for its circulation and its scheduling for discussion, although timing is usually a matter for consultation in advance. PCO's own production of documents consists mainly of briefing notes, Committee Reports to Cabinet and Cabinet Records of Decision (RDs).

Most PCO work is related to meetings of the Cabinet and its committees. In the preparation for a meeting the emphasis is on succinct but comprehensive briefing notes for committee chairmen and the Prime Minister as chairman of Cabinet. In the follow-up to a meeting the emphasis is upon the rapid and accurate preparation of Records of Decision or Committee Reports and their circulation. Minutes are prepared too but they are not nearly as important as operating documents.

The key document produced within PCO is the RD, which communicates the collective ministerial decision to the public service and is the basis of activity and follow-up. Not surprisingly, an important skill is the drafting technique involved in preparing accurate and generally acceptable RDs. Strictly speaking, the RD is a record of the agreement of ministers rather than a directive with any legal effect. But because the system is well-accepted and required by ministers, the RD serves as the basic authority for subsequent action to implement ministers' decisions and it is taken very seriously indeed by all concerned. The role of the secretariat in codifying the decision is necessary to ensure that everyone knows what has emerged from a discussion, and knows it in a clear form that can be challenged and changed if it is incorrect or inadequate.

b) Meetings

Meetings are a common feature of government operations, but PCO's use of meetings is unusual in the sense that its object is more to get the right people together than to obtain a certain desired outcome.

Its role in connection with ministerial meetings is as Cabinet's secretariat. Bilateral meetings between PCO officials and Ministers are rare and tend to be limited to occasional briefings, exchanges of information and clarification of misunderstandings related to Cabinet.

PCO is also involved in many interdepartmental meetings. Formal meetings of many interdepartmental committees involve PCO, as secretariat, chairman or member, although PCO's approval is not required for the setting up

of any but the broadest and most senior committees. The Secretary to the Cabinet is involved in relatively few standing interdepartmental committees and generally the Deputy or Assistant Secretaries attend in his stead.

Bilateral meetings, by nature ad hoc, are most frequent for all PCO officers. It is the essence of PCO activity to establish and maintain contacts with departments in carrying out its secretariat, monitoring, advisory, and brokerage functions.

PCO Operational Principles

PCO's operational principles are not original or unique, but they are an important part of suiting its activities to its functions.

a) Decentralization

PCO is run on a basis of decentralization and delegation both in terms of pushing activity to more junior levels, and listening to and respecting the views of those at the operational levels. This means, first, that resources, responsibility and authority are concentrated at the assistant secretary level. Second, as a general rule, when advice comes up from the assistant secretary level, it is annotated rather than rewritten by more senior PCO officials on its way to ministers. This is meant to encourage a variety of views, and the development of expertise and confidence at the "desk officer" level.

b) Consultation

Decentralization works only in company with consultation. Most problems that come before PCO concern more than one secretariat, and each secretariat brings a different perspective to bear. Consultation is expected to take place and to be initiated actively rather than simply awaited. To encourage a free flow of information, common PCO files are maintained rather than separate files for each secretariat. Memoranda are circulated widely, and open staff meetings are held frequently.

c) Staffing

Capable people are crucial to successful organizations. Several staffing principles apply to PCO as means of reinforcing its performance.

PCO is staffed by career public servants. They are Public Service Commission appointments made without ministerial or prime ministerial intervention.

Staffing is rotational; officers are brought to PCO from other departments, and they leave PCO to work again in other departments. The normal term to be expected for the majority is about three years; perhaps 20 per cent stay longer, to five years or so. This policy is intended to prevent the development in PCO officers of entrenched and unjustified proprietary feelings for their areas which could make them lose touch with departmental viewpoints.

This rotational policy is also intended to contribute to personnel development in the public service. PCO experience is valuable to anyone in later career and should be available to more than a few.

d) Levels of Privy Council Office Activities

Assistant secretaries are the key working level of PCO and its key level of expertise. They not only deal with what comes in to them, but in a sense manage the area for which they are responsible. They are expected to brief others quickly, spot problems, take competing views into account, and weigh and balance rather than advocate. They should act in tune with departments, not against them, and play a synthesizing role to complement the policy development and implementation roles of their peers in departments.

Assistant Secretaries are senior people at a level which permits them to deal as equals, with assistant deputy ministers, and to be taken seriously by deputy ministers. It is the nature of secretariat responsibilities that manpower could be added almost endlessly, but these units are deliberately kept to half a dozen officers or fewer. Their size is an important factor in restricting PCO operations to what is truly important or urgent, and to PCO's most essential functions.

Deputy secretaries are intermediate between assistant secretaries and the Secretary to the Cabinet and as such share both roles to a degree. In many respects they must be fully capable of acting for the Secretary.

The Deputy Secretary (Operations) is responsible for the smooth operation and effectiveness of Cabinet and its committees as a whole. The Deputy Secretary (Plans) assists the Prime Minister and Cabinet in establishing objectives and priorities, and in relating new issues to these objectives. The Deputy Secretaries watch over the functioning of the system and to ensure PCO does not overstep its role.

The Secretary to the Cabinet is the senior deputy minister of the public service. His responsibilities must remain consistent with that position if he is to fulfill them effectively. He is not concerned with advancing a partisan political viewpoint; where that is required, the PMO and particularly the Principal Secretary to the Prime Minister are involved. The Secretary to the Cabinet is concerned with the equilibrium of the policy-making and administrative system as a whole from a public service perspective. Consequently he spends a great deal of time on matters of personnel policy and appointments, national security, and policy issues of immediate, major importance.

The Secretary has an important leadership role which would be inconsistent with absorption in a day-to-day management. He spends a good deal of time on particular issues, in contexts where he can ensure by his involvement that the range of choices open to the government are clarified and the advantages and disadvantages of various courses of action identified.

The Secretary therefore devotes more time to ensuring that the system works in general than to the development of particular policies. To permit himself to edge into others' responsibilities, to take on their autonomy would disrupt the system and undermine his own effectiveness. The Secretary to the Cabinet is a catalyst, a binding agent, and in some areas a supervisor. As the Prime Minister's own deputy minister, he must support the Prime Minister's responsibility for the effectiveness and coherence of the governmental system. While the Secretary will always be an influential person in an influential position, he must focus his influence and base it upon his own unique perspective if he is to fulfill it effectively.

IV CONCLUSIONS

The Prime Minister needs official support as head of a Cabinet government, as chairman of Cabinet and head of the ministry. He requires assistance in giving general direction to government policy, in choosing the principal office-holders, in establishing and balancing ministerial mandates and in areas of special responsibility. Cabinet requires central machinery to serve the process of collective decision-making. All these tasks have become more complicated over the last twenty years. And this has meant change for the Privy Council Office -- to adjust to developments across the government and to correct errors and imbalances in PCO's own performance.

There will always be difficulties in any organizational structure and in any one method of operations. The task is to be sensitive to the problems, and flexible in working out solutions.

The role of the Privy Council Office, R.G. Robertson observed, is "replete with possibilities for misunderstanding". This paper has tried to dispel some of the mystery about PCO that could promote such misunderstanding. It has attempted to convey the efforts made by PCO to meet the tests of sensitivity and flexibility in a rapidly changing environment. Finally, it has attempted to describe Cabinet government, and PCO's place in serving that dynamic and admirable system.

